

The Relationships Between
International Arbitration and National Courts with
Specific Reference to Provisional Measures

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Abstract

The aims of research are directed at the relationships between international arbitration and national courts which are discussed in six chapters.

Chapter One describes mainly the difference between arbitration and other methods of resolving disputes by emphasising the advantages of arbitration.

Chapter Two concentrates on discussions of the legal nature of arbitration. Legality, which is necessary for the success of arbitration, is contrasted with business efficiency. As arbitration is based on its own legal foundation, the courts have gradually come to accept limited exercise of their supervisory powers upon it. Although arbitration may be floating over many different jurisdictions, it is safely recommended that mandatory laws should be observed with regard to arbitral proceedings as well as enforcement of arbitral awards.

Chapter Three deals with the matter of how the existence of an agreement to arbitrate is treated when court proceedings for provisional measures take place. When court proceedings are made in spite of the existence of an arbitration agreement, most national courts “stay” the court proceedings until the arbitrators render awards. It is argued that provisional measures should be available only from arbitral tribunal. From the limits of powers of the arbitral tribunal, however, various provisional measures from the courts may be necessary in making arbitration effective.

Chapter Four deals with detailed discussions of two different provisional measures: provisional measures from arbitral tribunal and provisional measures from national courts. For the arbitral provisional measures, practices in ICSID Tribunals and Iran-US Claims Tribunals deserve consideration. The practices in the world of arbitration clearly show that the success of any arbitration may be relied not only on the good faith of the parties, but also on the introduction of state power which may be regarded as contrary to the wishes of the parties to resolve their disputes by arbitration.

Chapter Five depicts a brief account of Korean circumstances in terms of the relationships between international arbitration and Korean courts. In Korea, the necessity of arbitration has been more appreciated by practitioners and academics than ever before. Users of arbitration in Korea may be able to benefit from experience in European countries and the United States with access to knowledge on the development of arbitration with which Korean practitioners and academics have responsibility to catch up.

Chapter Six is a conclusion. From the research on the relationships between international arbitration and national courts, the relationships look closer in Anglo-American countries than in Civil law countries. Nowadays, arbitrators are getting comfortable in dealing with provisional measures which might have been difficult to obtain from them. It is, however, recommended that users of arbitration bear in mind the consensual nature of arbitration and understand the laws and practices of national courts which may affect the arbitral proceedings as well as the enforcement of awards.

Declaration

I declare that the thesis has been composed by me, and that the work is my own.

Pyoung-Keun Kang

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Abbreviations

AC	Appeal Cases
ADRLJ	Alternative Dispute Resolution Law Journal
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
All ER	All England Reports
ALR	Australian Law Reports
Arb.Int	Arbitration International
Arb.J.	Arbitration Journal
Brooklyn J.Int.L.	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
Can.Bar.Rev.	Canadian Bar Review
CJQ	Civil Justice Quarterly
CLJ	Cambridge Law Journal
CLOUT	Case Law on UNCITRAL Texts
CMLR	Common Market Law Review
Colum.J.Trans.L.	Columbia Journal of Transnational Law
Const.L.J.	Construction Law Journal
Cornell L.Q.	Cornell Law Quarterly
DLR	Dominion Law Reports
ECR	European Court Reports
Hague Recueil	Hague Recueil des Cours
Harv.Int.L.J.	Harvard International Law Journal
Harv.L.Rev	Harvard Law Review
IBL	International Business Lawyer
ICLQ	International and Comparative Law Quarterly
ICSID Rev.-FILJ	ICSID Review-Foreign Investment Law Journal
ILM	International Legal Materials
ILR	International Law Review
Int.Law.	International Lawyer
Iran-US CTR	Iran-United States Claims Tribunal Report
J.Int.Arb.	Journal of International Arbitration
JBL	Journal of Business Law
JCI Arb	Journal of Chartered Institute of Arbitrators
JMLC	Journal of Maritime Law and Commerce
JWT	Journal of World Trade
Law&Pol'yInt.Bus.	Law and Policy in International Business
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
MAL Quarterly	Model Arbitration Law Quarterly
Mich.J.Int.L.	Michigan Journal of International Law
MLR	Modern Law Review
NLJ	New Law Journal
NYUJ Int'l L&Pol	New York University Journal of International Law and Policy

NYIL	Netherlands Yearbook of International Law
NYLJ	New York Law Journal
NZLR	New Zealand Law Reports
QB	Queen's Bench
SC	Session Cases
SJ	Solicitors Journal
SLT	Scottish Law Times
Stanford L.Rev.	Stanford Law Review
Tex.Int.L.J	Texas International Law Journal
Tul.L.Rev.	Tulane Law Review
U.Chi.L.Rev.	University of Chicago Law Review
U.Pa.L.Rev.	University of Pennsylvania Law Review
Va.J.Int.L.	Virginia Journal of International Law
Va.L.J.	Virginia Law Journal
Vand.J.Trans.L.	Vanderbilt Journal of Transnational Law
WLR	Weekly Law Report
WTAM	World Trade and Arbitration Materials
Yale LJ	Yale Law Journal
YCA	Yearbook of Commercial Arbitration

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CHAPTER ONE: INTRODUCTION

I. International Business and Arbitration

A. Choice of Legal Methods of Resolving Disputes

In international business transactions and documentation, it is normal practice, whether litigation or arbitration is contemplated, to take advantage of the principle of autonomy of the parties, and to have an agreement between the parties, of one sort or another, for the designation of a legal system or the place or forum for any dispute which may arise in the future in connection with the transaction.

Since each country may apply its own laws, in fact, there are wide differences among national laws relating to the formation and performance of contracts, the procedure to be followed in the event of disputes, and the remedies available to injured parties. Lawyers for those dealing with international commerce are more likely to feel comfortable in using their own legal principles when they have to construct and define the relationships arising out of international contracts.

Although there have been increasing demands to harmonize and unify international trade law including arbitration laws, it will take some time before harmony and unity are obtained. As a compromise until substantial codification of relevant regulations on international commerce is made, choice-of-law, or choice-of-forum clauses in international contract are generally accepted and effective in resolving disputes.

Whether the choice of disputing parties is to fall on arbitration or litigation for resolution of disputes in the commercial community may well depend more on such a community's understanding of what the courts do - giving that expression the widest possible meaning - than on anything else, and that understanding depends on the 'messages' that come from the courts, especially as they relate to the balance of

incentives and disincentives to litigation.¹ It seems clear from legislative development that the full usefulness of arbitration lies in making it an integral part of the legal system, by which it serves as a substitute for a court trial upon the election of the parties or upon order of court.

Some reflections on Korean situations in terms of methods of resolving disputes may be made in this context. Since Korea is surrounded by super-powers having different economic and political systems, and is facing the unpredictabilities of its belligerent sister country, North Korea, Korea is in a situation in which it has to increase the volume of exports with its trading partners for the national security and the national wealth for the people.

With regard to the question as to which methods of resolving disputes should be encouraged, the Courts in Korea may find a solution by turning to their counterparts in other countries. If the courts in developed countries have to deal with matters with respect to disputes arising out of international trade, it is most likely that such matters may be brought before the courts in Korea under the condition that Korea is expanding further its national wealth by international trade.

B. Choice of Litigation or Arbitration

1. Generally

Merchants, manufactures, or bankers worried about the possibility of non-neutral foreign courts often agree to the jurisdiction of a third-country tribunal in order to reduce the prospect of adjudication in the adversary's home country. The businessman doing business in several countries has the fear of discrimination against the foreigner by the local courts, consciously felt in actual bias or unconsciously exhibited by preference for local principles of law.²

1. Jolowicz, 'On the Nature and Purposes of Civil Procedural Law,'(1990) CJQ 262, p. 273.

2. Quigley, 'Accession by the U.S. to the United Nations Convention on the Recognition and

In business relationships with a cross-border dimension, arbitration and choice-of-forum clauses can enhance significantly the prospect of fair and predictable dispute resolution by avoiding the possibility of a biased or otherwise non-neutral court. Typically these clauses include either a jurisdiction clause that grants exclusive adjudicatory competence to the courts of a third country or an arbitration clause, or both.³ In theory, both arbitration and judicial settlement involve the application of law - to the exclusion of political discretion or, indeed, any other 'non- legal' factors - and result in a binding award or judgment.⁴

2. Weakness of Litigation

Analytically, international litigation, as seen from the standpoint of the potential plaintiff, involves four distinct elements: the courts, choice of governing laws, proof of facts, and enforcement of judgment. First, he must find a court willing to hear his case. Secondly, the plaintiff must persuade the court selected to apply that version of the appropriate system of law which is favourable to him. Thirdly, he must be able to prove the facts necessary to establish a right to relief thereunder. And finally, the plaintiff needs the assurance that a judgment in his favour will be capable of execution against the defendant's assets.⁵

In an international transaction, the absence of any reasonably neutral forum with compulsory jurisdiction makes the consequences of a business deal gone sour much more disagreeable than in an otherwise similar domestic transaction. Even if a neutral

Enforcement of Foreign Arbitral Awards,' (1961) 70 Yale L.J. 1049, p. 1051.

3. Park, 'Illusion and Reality in International Forum Selection,' (1995) 30 Tex.Int'l L.J. 135, p.137.
4. Bowett, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes,' (1983) Hague Recueil 169, pp.177-178.
5. Baade, 'International Civil and Commercial Litigation : A Tentative Checklist,' (1973) 8 Tex.Int.L.J.5

court can be found, a truly neutral court might have no nexus to the parties or the dispute, and from the start it is a risk that the contractually designated judge would refuse to hear the case.

Foreign parties may fear that the local courts could not withstand the pressures of their government and would co-operate in defeating the foreign party. To some degree this is simply the result of the fact that local courts are generally bound by whatever the local law is. By changing its statutes the local government may be able to make its courts enforce its wishes upon the foreign party, any contract to the contrary notwithstanding. Sometimes, there may simply have been little or no relevant local law for the courts to rely upon and there may have been no comparable local enterprises to serve as a base for an equal(national) treatment analysis.⁶ So foreign parties will ask for clauses that not only displace local courts but will also, at least to some degree, displace the local law.⁷

As far as procedural matters are concerned, there has been a great effort to make the multi-national litigation process efficient.⁸ But, the result is not conspicuously successful. When a cross-border business deal turns sour, the high price of jurisdictional uncertainty can include litigation before xenophobic judges with procedural traditions very different from those which the parties were familiar with, whose integrity or whose independence is questionable.

For the recognition and enforcement of judgments, although there is some success on a regional basis⁹, the failure of the attempt at a bilateral treaty between the

6. Hunter, *et al.*, *The Freshfields Guide to Arbitration and ADR*(1993), p.2.

7. Vagts, 'Dispute-Resolution Mechanics in International Business,' (1987) 203 Hague Recueil 9, p.82.

8. Convention on The Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, opened for signature Nov. 15, 1965, 658 UNTS 163, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar.18, 1970, 847 UNTS 231.

9. The Brussels Convention, EC-EFTA Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention) of September 16, 1988, 28

United Kingdom and the United States of America illustrates the difficulties inherent in the development of a convention on foreign judgment recognition and enforcement.¹⁰

Given the confusions and uncertainties that beset litigation in national courts where international matters are at stake, no party would be willing to submit itself in advance to the courts of any country other than its own. In such cases, it is no surprise that parties think of arbitration whenever they enter into agreements with counterparts from other countries.

3. Arbitration as a Practical Choice

In international cases, where jurisdictional problems are bound to arise in the event of dispute, the practice of incorporating arbitration clauses into contracts is becoming almost universal. Businessmen instinctively prefer arbitration, and take as its advantages private, informal, speedy and friendly resolution of disputes.¹¹ Such advantages may have little or nothing to do with the merits of disputes or the process of arbitration. In some communities, arbitration is habitually chosen as a method of resolution since an arbitration clause is printed in standard contracts. As a compromise or an easy option, arbitration is constantly chosen when business partners do not agree upon a method of resolving disputes.¹²

The commonly accepted definition of arbitration in both common law and civil

ILM (1989), 620

10. Adler, 'If We Build It, Will They Come? - The Need For a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments,' (1994) 26 Law & Pol'y Int.Bus. 79, p.91, Hay & Walker, 'The Proposed Recognition of Judgments Convention Between the United States and the United Kingdom,' 11 Tex.Int.L.J.421(1976), Smit, 'The Proposed US - UK Convention on Recognition and Enforcement of Judgments : A Prototype for the Future?' 17 Va.J.Int'l L. 443 (1977), Hay & Walker, 'The Proposed US - UK Recognition of Judgments Convention : Another Prospective,' 18 Va.J.Int'l L. 753 (1978)
11. Kerr, 'International Arbitration v. Litigation,'(1980) JBL 164
12. Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 IBL 161

law systems, is that it is a mode of resolving disputes by one or more third persons who derive their powers from agreement of the parties and whose decision is binding upon them. One main advantage of arbitration is that the parties to a contract can initiate arbitration proceedings to resolve disputes without termination of the agreement. A dispute on one aspect of a project may be resolved without causing or requiring a breach or delay in the underlying transaction which neither party desires or can afford.¹³

In arbitration the parties will scarcely have to worry about *forum non conveniens* or subject matter jurisdiction; if they can cover the arbitrator's fees, the parties can almost always find arbitrators to hear a dispute. A panel composed of arbitrators with nationalities different from the parties, applying neutral procedures in a common language, usually assures a less biased deliberation than proceedings before one side's national judges.

Although moral norms may be sufficient to ensure respect for arbitral awards rendered within the framework of domestic trade associations and professional groups, they will not be sufficient to ensure the satisfaction of arbitral awards arising out of international disputes between parties who have no relationship other than the contract by which they are linked. The absence of any multilateral convention for the recognition of foreign judgments, and the existence of very few bilateral treaties with such purposes, makes the arbitral solution not only attractive but compelling. This is due to the existence of an international mechanism for the enforcement of foreign arbitral awards.¹⁴

13. McClelland, 'International Arbitration: a Practical Guide to the System for the Litigation of Transnational Commercial Disputes,' (1977) 17 Va.J.Int.L. 732.

14. In most cases the losing party voluntarily complies with the arbitral award either out of good faith or because his commercial reputation is at stake and few nations treat foreign awards on a par with domestic awards. But, in some nations, discrimination against foreign awards takes the route of requiring a full lawsuit upon the award and its underlying agreement.

C. Enforcement of Arbitration Agreement and Awards

1. Demands from the International Community

While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum.¹⁵

In a modern legal framework for an arbitration that appears likely to influence reformation and enactment of arbitration laws, considerable efforts have been made to make commercial arbitration effective, on the one hand, and to maintain arbitral autonomy intact, on the other. Amongst them are international commitments to ensure that arbitration agreement and arbitral awards can be enforced easily on the international level.¹⁶

2. Geneva Protocol and Convention

During the early period after the First World War, the highest priority of the international business community was to assure international recognition of agreements to arbitrate and of arbitral awards. On the international level this could be accomplished only by treaty.¹⁷ Immediately after the First World War, the League of Nations became interested in commercial arbitration. At the same time promotion of

15. Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration,' 30 *Tex.Int'l L.J.* 1(1995), p.2.

16. Craig, *et.al.*, 'French Codification of a Legal Framework for International Commercial Arbitration : The Decree of May 12, 1981,' (1981) 13 *L.& Pol'y Int.Bus.*727, p.728.

17. Craig, *op.cit.*, p.9.

commercial arbitration through the League was keenly supported by the newly founded International Chamber of Commerce (ICC), in connection with its plan for an International Court of Arbitration.

Two important multilateral treaties on arbitration were concluded in 1923 and 1927 under the auspices of the League of Nations.¹⁸ The first of the two treaties prepared by the League was the Protocol on Arbitration Clauses. In 1927, the Geneva Protocol was followed by the Convention on the Execution of Foreign Arbitral Awards. The 1923 Protocol was designed to assure the validity of clauses providing for arbitration of future disputes; it provided that where parties from Contracting States agreed to submit a dispute to arbitrate, the courts of those Contracting States would decline to adjudicate the merits of that dispute and would refer the parties to arbitration. Although the Protocol helped ensure respect of agreements to arbitrate, it did not ensure that resulting arbitral awards would be enforceable.

This was not achieved by the 1927 Convention, either. The reason is that an award rendered in a Convention State was required to be recognised in another Convention State only if it had first been judicially recognised where it had been rendered, which is the so-called 'double exequatur.'

This requirement of 'double exequatur' greatly limited the usefulness of the 1927 Convention. The inadequacies of the Geneva Protocol of 1923 and Convention of 1927 led the International Chamber of Commerce to draft a new Convention that would liberate international arbitration from many of the constraints of burdensome procedures and national law.¹⁹ In the opinion of the ICC the main defect of the Geneva Convention was the condition that, to be enforced, an arbitral award must be strictly in accordance with the rules of procedure laid down in the law of the country where arbitration took

18. The Geneva Protocol on Arbitration Clauses, Sept.24, 1923, 27 LNTS, The Geneva Convention on the Execution of Foreign Arbitral Awards, Sept.26, 1927, 92 LNTS 302.

19. Nussbaum, 'Treaties on Commercial Arbitration - A Test of International Private - Law Legislation,' (1942) 56 Harv.L.Rev. 219.

place. The ICC draft sought to attain its purpose mainly by widening the scope of application and providing that, as a condition for enforcement, the composition of the arbitral authority and the arbitral procedure must be in accordance with the agreement of the parties; only in the absence of such agreement must they conform with the law of the country where arbitration took place.²⁰

3. New York Convention

By abolishing the *double exequatur* requirement of the previous Convention, the New York Convention was aimed at giving international currency to arbitral awards.²¹ The purposes of the New York Convention are designed to be secured by reversing the burden of proof which has to be satisfied by the person who objects to the enforcement or recognition of an award under the Convention.²²

The New York Convention supersedes the Geneva Protocol with regard to the recognition and enforcement of arbitration agreements, and the Geneva Convention with regard to the recognition and enforcement of foreign arbitration awards, but only to the extent that a State which is a contracting party to the Geneva Protocol and Convention is also a contracting party to the New York Convention. When this concurrence does not exist the Geneva Protocol and Convention continue to appertain.²³ Plainly the

20. Contini, 'International Commercial Arbitration : The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,' (1959) 8 AJCL 283, p.290.

21. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 19, 1958, 330 UNTS 38, Franco and Elisabetta Consolata Lucchetti and Maria Teresa Togna v. Co.SIAC. - Compagnia Siciliana di Appalti e Costruzione SpA, Italy: Corte di Cassazione [Supreme Court], 3 Nov. 1992, no. 11891, YCA (1994) 686

22. Le Swie Horng Steel Enterprises Co.Ltd. v. Guardia Shipping Corp., Corte di Cassazione [Supreme Court], 10 Nov. 1992, no. 12093, YCA (1994) 687, ILET-Industrie Legnami Trentina S.r.L. v. Ditta Holzindustrie Schweighafer S.r.L. and Co.S.a.s., Corte di Cassazione [Supreme Court], 16 Nov. 1992, No.12268, YCA (1994) 694.

23. Part II of the English Arbitration Act 1950 enacts the Protocol on Arbitration Clauses, 1923, as supplemented by the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927, as part of the law of the United Kingdom (both the parties and award must be of 1927 Convention States) and the Arbitration Act 1975 was similarly passed in order to enable the

rationale of the Convention is for the enforcement of foreign arbitral awards unless either the unsuccessful party is seeking to have it set aside in the country where the award was made or there are some fundamental grounds of objection on grounds provided for in the Convention.

What the Convention did not do, however, was provide any international mechanism to ensure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.²⁴ While the Convention is concerned to see that the rules of the enforcing state do not impose “more onerous conditions” than in respect of domestic awards²⁵, it does not require that a regime any more advantageous to a foreign judgment creditor be created in respect of Convention awards.²⁶

The French courts construe Art.VII of the Convention as enabling any interested party of any right to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such an award is sought to be relied upon. It follows that in an appeal against the enforcement of a foreign award before the courts it should be understood that, according to Art.VII of the New York Convention, French domestic law will prevail if the conditions for recognition or enforcement of the award laid down in French domestic law are less strict than those specified in the said Convention.²⁷ Dutch courts are also following suit.²⁸

United Kingdom to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (award must be of 1958 Convention State). Provisions on arbitral awards under those two Conventions are not affected by the new English Arbitration Act in accordance with section 66(4) of the Arbitration Bill(H.L.).

24. Craig, ‘Uses and Abuses of Appeal in International Arbitration,’ 4 Arb.Int. 174 (1988), Park, ‘National Law and Commercial Justice : Safeguarding Procedural Integrity in International Arbitration,’ 63 Tul.L.Rev. 647 (1989)

25. Article III of the New York Convention

26. Far Eastern Shipping Co. v. AKP Sdvcomflot, [1995]1 Lloyd’s Rep. 520, p.524.

27. Société Unichips Finanziaria SpA S.A. and Unichips International BV v. François Gesnouin

D. Basic Features of Arbitration

Businessmen want arbitration which gives them experts to pass judgment upon facts, which are often far more important to them than questions of law. They want relief from decisions by judges or juries who may be profoundly ignorant of the many technical elements in modern trade or commerce, and they want freedom from requirements of common law procedure and rules of evidence in determining these matters. They regard the courts as lagging behind the increasing need of the business community for speed, expert knowledge, and smooth and inexpensive methods in the settlement of disputes.²⁹

Basically, businessmen want their agreement to refer future disputes to arbitration and subsequent award from arbitration to be recognised and enforced. In the event of a dispute, it is no longer unusual that a party may fail to cooperate in the arbitral process, or even actively obstruct it, and will fail to voluntarily execute an award when rendered. This in turn leads to the need to consider judicial assistance to the arbitral process and to assure respect of the award obtained, involving recourse to the enforcement powers enjoyed only by a sovereign state.³⁰

In the very nature of the process, the arbitral tribunal depends on consent. This

and Michaël Gesnouin, Cour d'Appel [Court of Appeal], Paris, 12 Feb. 1993, YCA (1994) 658, Polish Ocean Line v. Jolasry, Cour de Cassation [Supreme Court], 10 March 1993, YCA (1994) 663

28. Owerri Commercial Inc.(Panama) v. Dielle Srl (Italy), Netherlands : Gerechtshof [Court of Appeal] The Hague, 4 August 1993, YCA (1994) 703

29. In 1920s when a new arbitration act was considered necessary in the United States, the evil to be corrected includes as follows :

(1) The long delay usually incident to a proceeding at law, in equity or in admiralty;
(2) The expense of litigation;
(3) The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world. (see Cohen and Dayton, 'The New Federal Arbitration Law,' (1926) XII Va.L.J. 265, p.269)

30. Quigley, *op.cit.*, p.1051.

illustrates one of the advantages of arbitration over judicial settlement; the parties to an arbitration clearly enjoy a greater degree of control which may be passed to arbitrators. The consensual basis of an arbitration is radically different from that of plaintiff and defendant in litigation in the courts.³¹ On the basis of parties' consent, the power of arbitrators derives from statute and from a consensual conferment of jurisdiction by the parties when agreeing to submit disputes to arbitration in a given country. The most intractable disputes, involving the most complicated fact and law situations, are no longer resolved in court proceedings, but in arbitration. This means that business managers will generally be held to their bargains notwithstanding later regrets about having abandoned recourse to judicial proceedings.³²

Yet, clearly, there must be limits to the control of the parties if the tribunal is to function as an independent judicial body, applying the law in an impartial and objective manner. The reason is that settlement of disputes by peaceful means is not the same as settlement by legal means. Ever since the arbitration system has emerged as a primary forum for the resolution of international commercial disputes, many counsel have been disappointed to find that the system did not operate efficiently enough to ensure their clients a fair hearing on the merits of a commercial dispute. As a result, reforms at the national and international level have been necessary to make the system a more efficient, workable device. While individual legal systems display many similarities in arbitration laws, sometimes subtle differences make analysis all the more important to commercial interests contemplating transnational arbitration agreements.

As the volume of international trade and commerce increases fast and the importance of arbitration is appreciated to satisfy the needs of the community of trade and commerce, the efforts to expedite and unify arbitration practice pursuant to the

31. *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] AC 909, p.964.

32. *Farrel Corp. v. USITC*, 949 F.2d.1147 (Fed.Cir. 1991)

national legal systems have never been more accentuated than at present.³³ Apart from the domestic legislation in the various states, which generally applies to foreign as well as domestic arbitral agreements and awards, treaties, both bilateral³⁴ and multilateral, provide an international regime for the recognition and enforcement of foreign awards. Many commercially important nations, in attempting to solve the problems inherent in international arbitration, have resorted to the use of multilateral conventions.³⁵ These have presented the promise of speed and multinational uniformity that is missing in the bilateral approach.

II. Alternative Dispute Resolution (ADR) and Arbitration

A. Arbitration as an ADR

Although arbitration is a purely consensual proceeding for resolution of disputes in private, the procedure has legal consequences for everyone involved in it. From the fact that court litigation and arbitration are similar to each other in character in that a judge or an arbitrator as a neutral third party has to make a decision which binds the parties in dispute, many rules of law and procedure are needed to protect the interests

33. The rush of the reform of domestic arbitration laws has been prevalent among European countries in adopting similar directions of limiting judicial scrutiny of courts into arbitration. English 1979 Arbitration Act, 18 ILM 1246 (1979), French Decree on International Arbitration of May 12, 1981, 20 ILM 917 (1981), Belgium Reform of 1985, 25 ILM 725 (1986), Dutch Statute on Arbitration of 1986, 26 ILM 921 (1987), Switzerland : Statute on International Arbitration, (Dec.18, 1987), 27 ILM 37(1988). This trend has been highlighted by the UNCITRAL Model Law whose adoption is growing. The New Canadian Statutes, 26 ILM 714 (1987), Florida International Arbitration Act, 26 ILM 949 (1987), Scotland, Hong Kong, Australia and other countries.

34. Quigley, *op.cit.*, p.1053.

35. Besides Geneva Protocol, Geneva Convention, and New York Convention, there are the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar.18, 1965, 575 UNTS 160, the European Convention on International Commercial Arbitration of 1961, Feb.9, 1968, 484 UNTS 349, and the Panama Arbitration Convention, 14 ILM 336

of the parties.

Given that arbitration has been developed from the inadequacy of court systems, it is sometimes understood that arbitration is considered as an alternative dispute resolution (ADR) method.

The presence of a skilled neutral with substantive expertise, the avoidance of issue-obscuring procedural rules, the arbitrator's freedom to exercise common sense, the selection of arbitrators by the parties, and the tradition of limited judicial review of arbitral decisions would make arbitration alternative to or even superior to litigation. Even though arbitration has started to overcome the defects of national court systems in relation to international commerce and trade, it has become more formalised and regularised than the forefathers of arbitration imagined.

It is probably not correct that parties choose international commercial arbitration as an alternative to litigation in order to save money; indeed, it is arguable whether arbitration is in fact cheaper. Furthermore, one of the advantages claimed for arbitrations that it leads to a speedier resolution of disputes, is also sometimes misleading.

Arbitrations vary greatly in their character from major proceedings which are almost indistinguishable from a heavy court action to disputes on the quality of commodities (the "look-sniff" arbitration). It is not difficult to expect that the former type lasts much longer than the latter to the extent that the advantage of speedy resolution is eradicated. Compared to court litigation, in the case of arbitration, there is no basic time-table unless it is provided by relevant rules of arbitration, by agreement of the parties or by order of the arbitrators. Where there is inordinate and inexcusable delay³⁶ and there is no agreement between the parties to this delay, the intriguing questions may be raised whether the courts of the place of arbitration can grant a

36. *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] AC 909, p.975.

discretionary remedy such as an injunction. To these problems, 'documents only' arbitration and procedures involving a more active participation by the arbitrator might give scope for shortening and cheapening arbitration procedures.

B. Difference between Arbitration and other ADR Methods

When it comes to the meaning of ADR, it seems more appropriate that ADR should be understood as 'additional' rather than 'alternative' dispute resolution. The reason is that while one cannot totally oust the jurisdiction of national courts, the parties should always provide for some obligatory and binding dispute resolution device - usually arbitration - to which recourse may be had should the consensual methods of ADR fail.³⁷ In this sense, arbitration should be distinguished from other ADR methods.

The critics of ADR, without differentiating arbitration from other forms of consensual methods of settling disputes, prefer fair and just adjudication to inexpensive, expeditious, and informal adjudication. In this understanding, writers have warned that ADR should not result in an abandonment of a constitutional system in which the 'rule of law' and public values reflected in it are created and principally enforced by legitimate branches of government and that rights and duties should not be delimited by those the law seeks to regulate, since ADR would not replace litigation, but instead would be used to make traditional court systems work more efficiently and effectively.³⁸

The views of the critics against ADR should be directed towards other negotiated methods of resolution rather than arbitration. With regard to formality, arbitration stands between ADR methods and court litigation. As lawyers have become more involved in arbitration, it is evident that they introduced disincentives of the court

37. Craig, *op.cit.*, p.4, Craig, 'Relationship between ADR and Arbitration : Some Observations,' 57 JCI Arb. 178 (1991), Street, 'The Language of ADR - Its Utility in Resolving International Commercial Disputes - The Role of the Mediator,' 58 JCI Arb. 17(1992).

38. Fiss, 'Against Settlement,'(1984) 93 Yale L.J.1073, Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?'(1986) 99 Harv.L.Rev.668, p.673.

system into arbitral proceedings. This, together with the work involved in collecting evidence, which is itself expensive, often has the effect of driving the parties apart until a late stage in the procedure and postponing settlement discussions until a long time has passed and much expense has been incurred. During this time the parties will usually have found it difficult to come together to discuss the case. The conclusion may be drawn that arbitration is not a particularly popular alternative to litigation except perhaps in specific areas for which it is thought suitable. In commodity, insurance, shipping, and construction fields, arbitration has historically been the preferred means of settling disputes.³⁹

Mediation and conciliation are commonly mentioned as ADR. These ADR techniques are only likely to succeed when the parties are genuinely motivated to reach an amicable settlement. In mediation or conciliation, the neutral third party has no power to decide any issue between the parties. Rather, his or her function is to help the parties agree a settlement. Unlike litigation before court or arbitral tribunal, however, the parties do not need to fight each other using non-violent means to achieve a result. Mediation and conciliation involve negotiating an agreed settlement. In theory, this is, by its nature, a simpler procedure. The parties are not obliged to agree to anything. This also generally requires a certain minimal level of trust and good will. They can discontinue the proceedings at any time before a settlement has been reached.

Although there is harsh criticism from the point of view of the business sector that arbitration has become formalised as much as court litigation, entailing disincentives inherent in court system, disputes can generally be resolved more rapidly through arbitration than through court proceedings, particularly when one takes account of the many levels of appeal available in the courts in most countries around the world.

39. Historically, international construction disputes have accounted for a large proportion (15-20 percent) of the arbitrations brought before the ICC. In 1993, on the contrary, while the ICC received over 350 requests for arbitration, it received only 13 requests for conciliation. Schwartz, 'Resolution of International Construction Disputes,' (1995) 23 IBL 149.

With respect to the matter of costs, there are also likely to be savings that stem from the nature of the procedure itself through saved time or limited recourse available against the award.⁴⁰

III. Universal Popularity of Arbitration and Accounts for Optimal Use of Arbitration

A. Prevalence of Arbitration in the World

While Western capitalist states have been deeply attached to 'judicial procedure' as a result of concurrent evolution of the civil court system and private ownership, socialist states have preferred arbitration as being more compatible with their underlying economic system.⁴¹ After the political turmoil which swept through Eastern Europe starting from the former Soviet Union, the state of judicial emergence of the court systems in Eastern Europe makes arbitration the only viable alternative for an effective process for resolution of disputes for cross-border transactions between Eastern and Western European countries. What has happened is that private arbitral institutions in such places as Ukraine, Croatia and Slovenia are replacing the old state institutions in Eastern and Central European countries. Also, the coming EC single European Market, and the expected substantial rise in cross-border trade and resulting commercial disputes, account for the increasing significance of arbitration on the international scene.⁴²

It is not difficult to expect that although the former Soviet Union has disintegrated into several Republics and has been losing its previous political control over other Eastern and Central European countries, newly created Republics and other

40. Schwartz, *op.cit.*, pp.153- 154.

41. Orban, 'The Challenge to the Enforcement of Socialist Arbitral Awards,' 17 *Va.J.Int.L.*375(1977), p.376.

42. Berger, 'International Economic Arbitration in Germany: A New Era,' (1992) *Arb.Int.* 101.

countries in the former Soviet blocks are watching changes in Russia closely. In 1993, Russia adopted a new international commercial arbitration law ("the 1993 Arbitration Law") modelled on the 1985 UNCITRAL Model Law. At the same time, Russia enacted a new statute concerning the Maritime Arbitration Commission ("the 1993 MAC Statute"). With the enactment of the 1993 Arbitration Law and the 1993 MAC Statute, foreign practitioners will find themselves in an alternative dispute resolution setting much more like that in the West than was the case under any previous Soviet or Russian arbitration legislation.⁴³ As the Central and Eastern European countries develop their own individual systems of arbitration in an international framework, arbitration in Europe will assume a new dimension and it is in that context that traditional institutions such as the ICC and the London Court of International Arbitration (LCIA) will have to respond and react to new challenges.⁴⁴

The preference for arbitration as a resolution method involving international trade and commerce is vast in China as well as in the Eastern Europe.⁴⁵ Although there is some concern on the proper interpretation of the word 'international', where one party to an arbitration was a Chinese entity and the other was a foreign company, or where both parties were foreign companies, the international requirement is indisputably met.⁴⁶ In this case, the "international" dispute is most likely to go to arbitration.

For some time, the Latin American countries were regarded as generally hostile

43. Block, 'Recent Developments at the Russian Maritime Arbitration Commission,' (1994) JMLC 521, p.525.

44. Marriott, 'The Politics of Arbitration Reform,' (1995) 14 CJQ 125, p.128.

45. On 31 August 1994, the Arbitration Law of the People's Republic of China was promulgated by the President of the state, as adopted at the 9th session of the Standing Committee of the 8th National People's Congress. This Law came into effect on 1 September 1995. Arbitration Law of the People's Republic of China, 7 WTAM 2. Several months before the promulgation of the new law, the China International Economic and Trade Arbitration Commission (CIETAC), on 17 March 1994, adopted new Arbitration Rules. CIETAC Arbitration Rules, 34 ILM 1663 (1995).

46. Moser, 'China's New International Arbitration Rules,' (1994) J.Int.Arb. 5, p.7.

to international arbitration. This hostility found theoretic support in the Calvo Doctrine, which held that foreign parties conducting local activities should be subject to the jurisdiction of local courts. The most concrete embodiment of the hostility was the virtually universal rule in Latin American countries that arbitration could not be ordered to refer to unless the parties entered into a *compromiso* submitting the dispute to arbitration, even if, prior to the dispute, they had agreed to arbitrate.⁴⁷ Nowadays, most Latin American countries adhere to the New York Convention as well as the ICSID Convention. Further, the North American Free Trade Agreement and the Inter-American Convention on International Commercial Arbitration of 1975 also provide arbitration for foreign parties.

The development of arbitration gives a new dimension in which the claimant need not have a contractual relationship with the defendant and where the defendant could not have initiated the arbitration, nor is it certain of being able even to bring a counterclaim.⁴⁸ These new areas are to be found in investment laws, and in bilateral investment treaties.⁴⁹

At least in the community of international arbitration where the arbitral tribunal will very often be comprised of people from both legal traditions, it is surely true that the divide between Common law and Civil law is narrowing and not continuing to widen, as national laws of those two traditions are construed along similar lines⁵⁰, and

47. Donovan, 'International Commercial Arbitration and Public Policy,' (1995) NYUJ Int'l L&Pol. 645, p.650.

48. Paulsson, 'Arbitration Without Privity,' (1995) 10 ICSID-FILJ No.2 232

49. North American Free Trade Agreement (NAFTA), reprinted in 32 ILM 289, 605 (1993), Art.26 of the Energy Charter Treaty, (1995) 10 ICSID-FILJ 258. In accordance with Art.1120 of NAFTA and, in similar way, under Art.26 of the Energy Charter Treaty an investor has the choice of either ICSID arbitration or UNCITRAL Arbitration.

50. In the sense of limiting judicial review, the national laws of traditional arbitration centres of France, Belgium, Netherlands, Switzerland, and England have many in common. After the Model Law was not adopted by the result of the 1989 DAC Report on the UNCITRAL Model Law (Departmental Advisory Committee on Arbitration Law, A Report on the UNCITRAL Model law on International Commercial Arbitration,1989 HMSO), England is expecting a new

arbitrators of Common and Civil law countries will have to work together as a single tribunal against their legal traditions.

B. Consideration of Pitfalls

Although arbitration can overcome ideological or cultural differences, many problems arise from the fact that the parties to arbitration quite often do not make full use of arbitration which may be custom-tailored to suit their needs and desires.⁵¹ When parties put their signatures on the agreement containing the arbitration agreement, they may emphasise the achievement of the agreement on a particular project more than close scrutiny of the arbitration agreement for a method of resolving disputes.

Sometimes the process of the courts may be abused by the recalcitrant party seeking to have the arbitration agreement found not enforceable on the ground that the arbitration offends public policy because it ousts the jurisdiction of the courts. Such litigation proceedings before the courts are subject to a variety of procedural complexities that may divert attention and resources from the central issues of the dispute.⁵²

When the arbitration agreement is involved with different governing laws of arbitration, the parties may face daunting questions of the choice of laws rules. Various jurisdictions follow different rules in selecting the applicable law to resolve disputes, and therefore inconsistent results are possible in different countries or even in different

English arbitration act. See, Veeder and Dye, 'Lord Bramwell's Arbitration Code 1884-1889,' (1992) *Arb.Int.*321.

51. In the World Trade Organisation (WTO) system, the Panel and Appellate phases are the central forces in the settlement of cases. Nevertheless, arbitration may play an important role in certain circumstances where the disputing parties are agreed to resolve their disputes through arbitration. See, Dillon, Jr., 'The World Trade Organization : A New Legal Order For World Trade?' (1995) *Mich.J.Int.L.* 349, p.388, Reisman and Wiedman, 'Contextual Imperatives of Dispute Resolution Mechanisms : Some Hypothesis and their Applications in the Uruguay Round and NAFTA,' (1995) *JWT* 5.

52. Nelson, 'Alternatives to Litigation of International Disputes,' (1989) *Int.Law.*187, pp.192-193.

courts in the same country. When a transnational contract is involved, “internationalized” arbitration with a “legally neutral” forum country and with an express agreement on governing law other than that of host state may be the only effective remedy for protection of the parties.⁵³ Despite a good deal of contrary legislation and law restricting judicial review of arbitration awards, a reviewing court may still find a way to subvert the award.⁵⁴

C. Sovereign State and Arbitration

At the enforcement stage of an arbitral award relating to disputes with a sovereign state, judges may refrain from calling into question foreign governmental acts, including exchange controls, even if they violate basic national public policy or international law. This judicial restraint has been referred to as the “Act of State” doctrine. Unlike comity, the act-of-state doctrine bars courts from questioning a foreign governmental act even if it runs contrary to domestic public policy.⁵⁵

Sovereign immunity is not a choice-of-law rule. It is, rather, a limit on jurisdiction that prevents one sovereign state from taking another into the courts of the former. Nowadays, a distinction between commercial activity and public activity is at the root of what is called the “restrictive” theory of immunity. Immunity from jurisdiction or from enforcement will attach to public acts, but will not prevent suit in cases arising from the state’s entry into the marketplace.⁵⁶ Upon the subject of whether

53. de Vries, ‘International Commercial Arbitration: A Contractual Substitute for National Courts,’ (1982) 57 Tul.L.Rev. 42, p.59. Despite the fact that the Saudi Arbitration Act distinguishes between national arbitration and international arbitration, it is admitted that an arbitration taking place outside the Kingdom is not subject to the Saudi arbitration system. See, EL-AHDAB, ‘Saudi Arabia Accedes to the New York Convention,’ (1994) J.Int.Arb. 87, p.88.

54. Laugbein, ‘Comparative Civil Procedure and the Style of Complex Contracts,’ (1987) 35 AJCL 381, p.390.

55. Rogerson, ‘The Situs of Debts in the Conflict of Laws,’ (1990) 49 CLJ 441.

56. Park, ‘When the Borrower and the Banker are At Odds: The Interaction of Judge and Arbitrator

a state entity challenges the integrity of arbitral awards against it, the wilful refusal of a party (and not only the state) cannot affect the jurisdiction of United States courts.⁵⁷

D. Minimum Consensus on Legal Attributes of Arbitration

The appropriateness of a country as the place of arbitration depends upon many factors. For example, the parties may seek a neutral country. In addition, they may prefer the substantive or procedural laws of a country or the method, costs, and speed of the country's arbitration process. The parties would be more careful to choose the place of arbitration since the familiarity of a particular law in a certain place may be effective in reducing such problems as can be raised before, during or after an international arbitration.⁵⁸ One of the most important factors is the role of the country's courts in the arbitral process.⁵⁹ On a national perspective, the divergencies between national laws on arbitration are great. Arbitration statutes in many countries are outdated, deal only with domestic arbitration, and then only with some aspects of arbitration.⁶⁰ And it is usually more difficult to achieve harmonization of national laws

in Trans- Border Finance,'(1991) 65 Tul.L.Rev.1323, pp.1339-40.

57. According to Section 1605(a)(1) of the 1988 Amendment of the Foreign Sovereign Immunity Act, a foreign state is not immune from the jurisdiction of United States courts when action is brought to confirm an award if : (A) the *situs* of arbitration is, or is intended to be, in the United States, (B) the award is or may be governed by a treaty or other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim could have been brought in United States Courts, or (D) the state has waived its immunity.
58. Samuel, 'The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate,' (1992) Arb.Int. 257.
59. Paulsson, 'The Role of Swedish Courts in Transnational Commercial Arbitration,'(1981) 21 Va.J.Int.L.211, p.215.
60. de Vries, *op.cit.*, p.52; The scant statutory regulation on arbitration provided a good reason for the adoption of the Model Law into Scotland. Before the Scottish version of the Model Law was adopted, the legislature has intervened in Scots arbitration law only three times in the last three hundred years, through the Articles of Regulation 1695, s. 25, the Arbitration (Scotland) Act 1894 (which consisted of only seven short sections, three of which were formal), and the Administration of justice (Scotland) Act 1972, s. 3. Scotland is expecting a new Act on

in procedural as opposed to substantive matters.⁶¹ In this sense, on the international level, it would be much healthier if international arbitration were to be regulated by a legal framework for arbitration that is in many respects more highly developed than an individual legal system composed of national laws and court decisions involving international arbitration.⁶²

The General Assembly of the United Nations recommended in 1976 the worldwide use of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1976 which, since then, have been accepted in countries with different legal, social and economic systems. As far as the United States is concerned, the rules were included in the model arbitration clause prepared by the American Arbitration Association (AAA) and the U.S.S.R. Chamber of Commerce for optional use in contracts between American firms and Soviet Foreign Trade Organizations. They were also listed in trade agreements between the United States and China. The Inter- American Commercial Arbitration Commission has substantially adopted the rules as its own institutional rules. The same is true with regard to the two Regional Arbitration Centres in Kuala Lumpur (Malaysia) and Cairo (Egypt) established under the auspices of the Asian-African Legal Consultative Committee.⁶³

In 1985, UNCITRAL adopted the Model Law which is intended to serve as a model for national arbitration law, harmonizing and making more uniform the practice

domestic arbitration.

61. Although arbitration procedures of individual countries are in some way similar to those of ordinary litigation, the principles relevant to litigation are not always applicable to arbitration, especially to one of international character.
62. Although England is a leading country in international trade and commerce, it remains the case that when English lawyers speak of international trade law they do not mean the international law of trade, they mean the national law governing international trade transactions. See, Goode, 'The Adaptation of English Law to International Commercial Arbitration,' (1992) 8 Arb.Int.1, p.11.
63. Suy, 'Achievements of the United Nations Commission on International Trade Law,' (1981) 15 Int.Law. 139

and procedure of international commercial arbitration.⁶⁴ Viewed in the context of existing machinery for effective international commercial arbitration, the Model Law was drafted to promote the policies and principles underlying both the New York Convention and various institutional rules and the UNCITRAL Arbitration Rules.⁶⁵ The genesis of the Model Law was the idea that trading nations would benefit by having available an international text as a basis for harmonizing national legislation by adopting the text *en bloc* or by reviewing national laws in accordance with desirable features of it.⁶⁶ That was the principal reason why the technique of a model law as opposed to a convention was adopted.⁶⁷ In this framework, the arbitral process is to be closely regulated. By doing so, the factors causing delay and expense in the arbitral process can be dramatically reduced.⁶⁸ This would be beneficial to the parties since it is the parties who will pay.⁶⁹

64. Sanders, 'Unity and Diversity in the Adoption of the Model Law,' (1995) 11 Arb.Int. 1.

65. Hoellering, 'The UNCITRAL Model Law on International Commercial Arbitration,' (1986) Int.Law.327

66. Steyn, 'England's Response to the UNCITRAL Model Law of Arbitration,' (1994) Arb.Int.1

67. Several countries have, in recent years, enacted new arbitration laws or made significant revisions to existing laws following the aims of the Model Law. Those countries include Canada, Australia, Scotland, Hong Kong, several states in the United States of America, Italy and Egypt.

68. The European Convention on Arbitration of 1961, the New York and the ICSID Conventions form the cornerstone of the legal effectiveness of agreements to arbitrate and of awards in international commercial and investment disputes. Supplemented by modern arbitration statutes, the UNCITRAL Rules, and the Rules of arbitration associations, this public international agreements and rules have developed into a special branch of international commercial procedure.

69. van Gelder, 'Maritime Arbitration : Quo Vadis? - Have Delays and Costs Caused Us to Lose the Way?' (1995) 12 J.Int.Arb. 79

CHAPTER TWO: LEGAL FRAMEWORK FOR INTERNATIONAL ARBITRATION

I. Jurisdiction of Arbitrator

A. Generally

International arbitrations developed as an alternative to national judicial systems, does not derive its authority from a nation but from an agreement between two private parties.¹ It is trite to say that parties who have entered into a commercial contract do so in the belief that their agreement will be given effect and will remain binding. Considering that an agreement between the parties to an arbitration reference constitutes an essential basis for the establishment and conduct of a commercial arbitration, one would expect any such stipulation or clause in an arbitration agreement to be observed by arbitrators without judicial interpretation.²

Quite often, court proceedings whereby a party seeks a stay will involve an argument as to the arbitrability of the subject matter of the dispute. Under many international arbitration rules including the ICC Rules, a plea that a matter is not arbitrable may, in principle, be raised at any time during the proceedings. Although administrative bodies under those rules, e.g., the ICC Court, do not themselves seek to make any determination in respect of a dispute's arbitrability, at least, once the tribunal has been appointed, arbitrators may be called upon to do so. This may conceivably give rise to the threshold doubt of what is the proper or substantive law of the contract and/or arbitration agreement which involves the extent of the powers of the arbitrator.

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1. Croff, 'The Applicable law in an International commercial Arbitration:Is It Still a Conflict of Laws Problem?' (1982) *Int.Law.* p.613; Shihata and Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties : The Case of Arbitration under the ICSID Convention,' (1995)9 *ICSID Rev.- FILJ* 183, p.185.
 2. Bentil, 'Commercial Arbitrators Authorised not to Apply Strict Rules of law and Judicial Reviews,' (1992) *JBL* 26, p.29.

B. Scope of Arbitration Agreement

Disputes take place where the parties are asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance.³

Where an arbitration clause in the contract states widely : “Any dispute arising out of or in connection with this agreement shall be referred to arbitration,” the question whether a dispute falls within the extent of the clause is most likely to be raised.⁴

Such differences should be regarded as differences which have arisen ‘in respect of’, or ‘with regard to’, or ‘under’ the contract, and the arbitration clause which uses these, or similar, expressions, should be construed accordingly.⁵ In most Contracting States to the New York Convention, where the wording of the clause is written widely, the court interprets it as the parties’ intention to refer all the disputes arising out of a particular transaction to arbitration.⁶ The arbitration agreement, if sufficiently widely drawn, is from its nature intended by the parties to govern any dispute that may arise between them, including a dispute about the initial illegality of the contract.

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3. ICC Award 4367 (1986) YCA 134, ICC Award 5946 (1991) YCA 97, Wintershall AG v. The Government of Qatar (1989) ILM 798, ICSID Award : SOABI v. La République du Sénégal, (1991) ICSID Rev.-FILJ 125, ICC Award 6320 (1992), YCA XX (1995) 62. Roy Saunderson v. Caltex Tanker Company (Australia) Pty Limited (Australia), Samsung Co. Ltd (Korea) and Samsung Shipbuilding & Heavy Industries Co. Ltd (Korea), Supreme Court of New South Wales, Admiralty Division, 19 July 1993, No. 15/92 The Australia Sky, YCA XX (1995) Australia No.10.
 4. Ashville Investments Ltd. v. Elmer Contractors, Ltd., [1988]3 WLR 867, The *Prima Paint* case, 388 US 395, 403-04, 87 S Ct 1801, 18 L Ed 2d 1270 (1967), Sweet Dreams Unlimited v. Dial-A-Mattress International, 1 F.3d. 639 (7th Cir. 1993), IBM Australia Ltd v National Distribution Services Ltd., (1991) 100 ALR 361.
 5. Heyman and another v. Darwins Ltd. [1942] 72 Lloyd L.Rep. 65, p.71; Chatterjee, ‘Do Disputes Arise ‘out of’ or ‘under’ or ‘out of and under’ a Contract?’ (1994) JCI Arb. 117.
 6. Brian Harper (British Columbia, Canada) v. Kvaerner Fjellstrand Shipping A.S.(Norway), British Columbia Supreme Court, Vancouver, 13 September 1991, in YCA (1993) 358.

C. Arbitrability and Public Policy

In principle, where a party contests the 'validity' of the agreement to arbitrate, and the arbitration has been set in motion, any decision as to the arbitrators' jurisdiction shall be taken by the arbitrators themselves.⁷ Even the underlying nullity of a contract should not defeat the arbitrator's obligation to rule on his own jurisdiction and, if appropriate, to proceed with the arbitration.

Public policy in its various guises is an integral part of the international commercial arbitration process. Public policy in one country directly impacts upon international arbitral proceedings when questions of the arbitrability of a dispute, or, the recognition or enforcement of an international arbitration agreement or award, require determination. The practical consequences of this are that the practitioner must be aware of the many instances in international arbitration (both procedural and substantive) where public policy will play a persuasive role, and then counsel the client accordingly.⁸

On the one hand, the policy consideration in relation to arbitrability is about the protection of the interests of members of the public who are not disputing. It is well

7. *Liberian Eastern Timber Corporation(LETCO) v. Government of the Republic of Liberia*, Award of Mar.31, 1986, 26 ILM 647(1987), ICC Awards 4589/1984, 5294/1988, Sigvard Jarvin *et al.*, *Collection of ICC Arbitral Awards 1986-1990*, (1994)

8. In *Omnium de Traitement et de Valorisation - OTV v. Hilmarton*, the Swiss arbitral award was quashed on grounds that the award was arbitrary in that it violated Swiss law when it found the Algerian contract to be in violation of Swiss public policy (Switzerland: Cour de Justice [Court of Appeal], Geneva, 17 Nov. 1989, Tribunal Fédéral [Supreme Court], 17 April 1990, YCA (1994) 214). In the meantime, OTV had requested the enforcement of the award in France. On 26 Feb.1990, the President of the Paris Court of First Instance granted exequatur, and on 19 Dec.1991 the Paris Court of Appeal confirmed the exequatur. (France : Cour d' Appel [Court of Appeal], Paris, 19 December 1991, 90-16 778, YCA (1994) 655). This decision was appealed to the Court of Cassation, which on 23 March rejected the appeal. Following the annulment, the dispute was resubmitted to arbitration in Switzerland before a new arbitrator and an award was made on 10 April 1992. The award was granted exequatur in France by the Court of First Instance of Nanterre on 25 Feb. 1993. The decision has been appealed to the Court of Appeal of Versailles.

recognised in the United States that fraud, duress and waiver are specific examples where public policy, in the common law sense, takes a particularly harsh line. For instance, both the securities and anti-trust laws in the United States are enacted both to provide relief for violation of the laws and to deter unlawful conduct.⁹ Policy is also related to the objectives of international arbitration and the enforcing arbitration act which is to encourage speedy, if somewhat informal, resolution of commercial controversies.

When a plea of public policy is raised before a court, therefore, the court is bound to balance between the policies in favour of international arbitration and the interests of the public. In many jurisdictions, the notion of public policy itself has evolved such that a distinction may be made between 'international' and domestic public policy, the former to apply in respect of international commercial disputes.¹⁰ The difference between international and domestic public policy depends on whether the arbitration in question has international character.

Where an arbitration is considered 'truly international',¹¹ the court is likely to

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9. Nissen, 'Antitrust and Arbitration in International Commerce,' (1976)17 Harv.Int.L.J.110; Schuster, 'Extraterritoriality of Securities Laws : An Economic Analysis of Jurisdictional Conflicts,' (1995)26 Law & Pol'y Int'l Bus. 165
 10. Fougere S.A. v. Procofrance S.A., France, Court de Cassation [Supreme Court], 25 May 1992, YCA (1994) 205.
 11. *In Scherk v Alberto-Culver*, 417 US 506, 41 L Ed 2d 270, 94 S Ct 2449 the plaintiff, an American corporation with its principal place of business and the vast bulk of its activity in the United States, purchased business enterprises along with all rights from the defendant, a German citizen, organized under the laws of Germany and Liechtenstein. The contract, signed in Austria, contained an arbitration clause providing that any controversy or claim arising under the contract would be referred to arbitration before the ICC in Paris, France. The closing of the transaction took place in Switzerland. The only contact between the United States and the transaction involved is the fact that Alberto-Culver is an American corporation and the occurrence of some - but by no means the greater part - of the pre-contract negotiations in the country. In ICC Award 5029/1986, the arbitral tribunal held that the arbitration before it was a truly international since the arbitration was based on contract involving the parties of different nationalities (i.e. French and Egyptian), the movement of equipment and services across national frontiers, and the payment in different currencies (i.e., Egyptian pounds and US dollars).

approach the arbitration on a different basis from a purely domestic case.¹² It is now more widely accepted than previously that a dispute should not be considered to be non-arbitrable simply because it concerns matters of public policy. Thus, as a practical matter, today the issue of arbitrability in respect of public policy is not an obstacle to the arbitration of most international commercial disputes.¹³

It follows that once the existence of the agreement to arbitrate has been proved, the court does not search into the matter of arbitrability, or the validity of arbitration agreements but just permits the parties to arbitrate even antitrust claims¹⁴, securities issues,¹⁵ or RICO claims¹⁶.

12. As a result, although a foreign arbitration award depends much on the enforcement mechanism of individual legal systems, the court before which the enforcement of arbitral award is sought tends more generous to foreign arbitral award under an international public policy than a domestic arbitral award under a domestic public policy. See, Aksen, 'The Need to Utilize International Arbitration,' (1984) 17 Vand.J.Trans.L. 12, p.16.

13. Schwartz, 'The Domain of Arbitration and Issues of Arbitrability : The View from the ICC,' (1994)9 ICSID-FILJ 17, p.19.

14. Aksen, 'US Court Defers Antitrust Issues to Swiss Arbitral Tribunal,' (1995) 12 J.Int.Arb.3, 173, Branson and Wallace, 'Choosing the Substantive Law to Apply in International Commercial Arbitration,'(1986) 27 Va.J.Int.L. 39, p.63; In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 US 614, 87 L Ed 2d 444 , a Puerto Rico corporation entered into distribution and sales agreements with a Swiss corporation and a Japanese corporation which manufactures automobiles in Japan. The sales agreement contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof. In the case, there still remained the possibility that American law was displaced even where it otherwise would apply, since a choice-of-law clause in the Sales Agreement provided the Swiss law as a governing law of the contract. The United States Supreme Court held that claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction were arbitrable pursuant to the Federal Arbitration Act. The Court merely noted that in the event the choice-of-forum and choice-of-law clauses operated *in tandem* as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, the Court would have little hesitation in condemning the agreement as against public policy.

15. The court in the *Scherk* case distinguished itself from the court of the former decision on *Wilko v. Swan* 346 US 427, on the grounds that the *Wilko* case was about the dispute out of the contract which had been drawn up by the brokerage house and allowed little scope for negotiation; and that both parties were U.S. national and the arbitration was to take place within the U.S. Coexisting with that of *Wilko v. Swan* case, this decision was followed in *Shearson/American Express, Inc. v. McMahon*, 428 US 1056, 107 S.Ct.2332, 96 L.Ed.2d.

D. Principles of Separability

1. Arbitration Agreement and Main Contract

An arbitration agreement may take one of two forms : a submission agreement, normally entered into by the parties after the dispute has arisen¹⁷; or, more commonly, an agreement which is taken out of an arbitration clause in the principal contract. This does not, however, mean that there is no way of making a separate agreement to arbitrate before the dispute is raised; or that there is only one submission agreement to a certain dispute. Whatever form an arbitration agreement may take, it is crucial to know the extent to which the effects of an arbitration clause are linked to the validity and continued existence of the principal contract. Disputes concerning the inter-relationship of the contract may arise, which established the rights and duties of the parties arising out of the material-legal contract, and the arbitration agreement (the arbitration clause). The disputes are as to whether the agreement is independent or autonomous in relation to the contract independently of the decision as to the question

185(1987); rehearing denied, 482 US 200, 108 S.Ct.31, 97 L.Ed.2d.819 . In *Ofelia Rodriguez de Quijas v. Sheason/American Express, Inc.*, Supreme Court of the United States, 15 May 1989, in YCA (1990) 141, the *Wilko* case was held to be incorrectly decided and inconsistent with the prevailing of other federal statutes governing arbitration agreements in the setting of business transactions.

16. The *Shearson v McMahon* case, 428 US 1056; The Racketeer Influenced and Corrupt Organizations Act, or RICO, is a Federal Statute in the US which provides for a broad range of criminal and civil claims to be brought as sanctions for fraudulent activities. The most noteworthy feature of RICO is that, unlike common law and other statutory fraud actions, a civil RICO claim provides for treble damages and payment of attorneys' fees for those who have been wronged by organized crime. RICO applies in particular to commercial activities constituting commercial fraud and the nature of a RICO claim is consequently tortious.
17. A submission agreement is often negotiated by counsel after a dispute arises and after attempts to settle the dispute amicably have failed. In these cases, counsel can agree to formulate a second arbitration agreement to supplement or even replace the original arbitration clause. Such an agreement is called simply an 'arbitration agreement' or the 'terms of reference,' and its purpose is to give the arbitrators specific instructions as to how the parties wish the arbitration to be conducted.

of the validity or invalidity of the contract, even where there are no direct references to the fact that an arbitration agreement (arbitration clause) is autonomous in relation to the contract. It is common ground that the tribunal has competence to decide upon the independence of an arbitration clause in a practical as well as a theoretical sense.¹⁸ This doctrine is the separability of the arbitration agreement which is closely related with, but different from, the concept of Competence/Competence.¹⁹ The latter concept is about the question of whether arbitrators are competent to decide on questions relating to their own jurisdiction. The scope of the principle of the separability of the arbitration agreement only arises for consideration where the challenge is directed at the contract, which contains an arbitration clause.

2. Necessity of Autonomy of Arbitration Agreement

The principle of separability enables the framework of arbitral jurisdiction to be widened so as to give less room for jurisdictional challenges and more space for facilitating arbitral processes.²⁰ The practical reason is that if a party could avoid arbitration by simply claiming that the main agreement is invalid, it would be a very

18. Article 1053 of the Netherlands Arbitration Act 1986, Article 178(3) of the Swiss Private International Law Act 1987, Article 21(2) of the UNCITRAL Arbitration Rules, Article 8.4 of the ICC Rules of Arbitration, Article 14.1 of the London Court of International Arbitration Rules, Article 16(1) of the UNCITRAL Model Law on International Commercial arbitration; All-Union Foreign Trade Association "Sojuznefteexport" (USSR) v. Respondent: Joc Oil Ltd. (Bermuda), Award in case no.109/780 of 9 July 1984, Foreign Trade Arbitration Commission At the USSR Chamber of Commerce and Industry, YCA (1993) 95. ICC Award 5485/1987, 4695/1984, Jarvin *et al.*, *Collection of ICC Arbitral Awards 1986-1990*, (1994).

19. Art.16(1) of the Model Law, Art.178(2) of the Swiss PIL, Art.1053 of the Dutch Act, Art.3(a) Santiago de Compostela Resolution of the Institute de Droit International (1990) ICSID Rev.-FILJ 139. von Mehren, 'Arbitration Between States and Foreign Enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution,' (1990) 5 ICSID Rev.-FILJ 54, LIAMCO v. The Government of the Libyan Arab Republic (1981) ILM 1, 40, Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co.Ltd. Hong Kong : Supreme Court of Hong Kong, High Court, 29 Oct.1991,[1992] ADRLJ 93.(The *Fung Sang* case)

20. Notes, 'Separability comes of Age in England: *Harbour v. Kansa* and Clause 3 of the Draft Bill,' (1995) 11 Arb.Int. 85

simple way to avoid arbitration or to delay the resolution of dispute.²¹

When the validity of the main contract involves the question of an arbitration clause contained in the contract, a court might be required to consider the substance of the dispute. It is of concern that to allow this would conflict with the widespread practice precluding a review of an award on its merits, and stultify the intention of the parties to refer their disputes to arbitration.²² As a result, the principle of separability relieves those engaged in international commerce of the burden of preparing arbitration clauses containing elaborate self-contained formulae to ensure survival of the arbitration clause.²³

As far as the consequences of applying the doctrine of separability in relation to the arbitrability of the subject matter of the contract are concerned, the first thing is to determine whether a valid agreement to arbitrate exists; secondly, if a valid agreement is found, whether that agreement covers the dispute in question; and finally, when a valid agreement covers the controversy, whether external systemic considerations, for example, whether the subject matter of the dispute is arbitrable, prohibit recourse to arbitration.²⁴

Since the foundation of an arbitrator's authority is the arbitration agreement, if the arbitration agreement does not in truth exist, the arbitrator has no authority to decide anything.²⁵ As a result, if there is an issue as to whether the arbitration agreement exists,

21. Schwebel, *International Arbitration : Three Salient Problems* (1987), p. 1.

22. Rogers & Launders, 'Separability - the Indestructible Arbitration Clause,' (1994) *Arb.Int.* 77, p.78.

23. *Harbour Assurance Co. (U.K.) v. Kansa General International Insurance Co.Ltd. (C.A.)*, [1992]1 *Lloyd's Rep.* 81, [1993]3 *WLR* 42, p.56, per Leggatt L.J.

24. *Mitsubishi Motors Corp. v. Soler Chrysler- Plymouth*, 473 US 614, 87 L Ed 2d 444 (1985), pp.454-457; Carbonneau, 'The Exuberant Pathway to Quixotic Internationalism : Assessing the Folly of Mitsubishi,' (1986)19 *Vand.J.Trans.L.*265, p.237.

25. In *A.S.Onassis v. H.P.Drewry, S.A.R.L.*, [1949]82 *Lloyd's Rep.*565, the Court accepted the plaintiff's contention that at the time of the making of a charter party, the company was not in existence or alternatively was not capable of making the charter party and addendum or of

that issue can only be resolved by the Court.²⁶

According to the principles of separability, issues of consent to the arbitration clause are different or separated from issues of consent to the entire contract. Thus, where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.²⁷ The principles of separability are effective in reducing delaying tactics which could halt the international arbitral process for reasons of public policy or arbitrability of subject matter of the arbitration.

E. Competence-Competence

It is quite a familiar setting where one of the parties commences a court action and the other applies for an order for dismissing or staying the proceedings or compelling arbitration. Quite often the party wishing to avoid the arbitration objects that the agreement in question is null and void,²⁸ inoperative or incapable of being performed,²⁹ in the sense of Art.II(3) of the New York Convention; as a result, Art.II(3)

entering into an agreement to refer disputes arising thereunder to arbitration; and, therefore, held that the charter party had been null and void, and that the subsequent agreement for arbitration was null and void.

26. Astor Chocolate Co.(US) v. Mikroverk Ltd.(Canada) and Mikroverk AS(Denmark), 704 Fed.Supp.(1989) 30, in YCA (1990) 613
27. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 US 395, 403-04, 87 S Ct 1801, 18 L Ed 2d 1270 (1967), 1277 (The *Prima Paint* case), Sauer-Getriebe KG v. White Hydraulics Inc., 715 F.2d. 348, 351(1983), *cert denied*, 464 US 1070, 104 S Ct 976, 79 L Ed 2d 214 (1984); Although the approach in *Prima Paint*, in practical sense, has been effective in promoting arbitration by requesting the party to refer the issue to arbitrators first, it may be objected on the ground that the legal issue of a contract's voidness because of fraud is not to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties, or for the reasons that there is no genuine consent to commit any issues in the dispute to an arbitrator when a party contends either that there is no contract or that the contract may be avoided because of fraud. See, Stempel, 'A better Approach to Arbitrability,'(1991) Tul.L.Rev.1377, p.1458.
28. Dalmia Cement Ltd. v. National Bank of Pakistan, ICC Arbitration Tribunal, 18 Dec.1976, 67 ILR 611

of the New York Convention does not compel the court before which the question of the existence of an arbitration agreement is raised, to refer the parties to arbitration.³⁰

When a request is made for a court to stop an arbitration, the first thing for the requesting court to consider is whether there is an enforceable arbitration agreement.³¹ Where the question is related to foreign law, the parties are likely to be asked to submit evidence about the effect of the foreign law on the agreement to arbitrate.³² Where the question is raised whether there is any valid agreement to arbitrate, the arbitrator has competence to hear and decide the question, although his decision is subject to the court of the place of arbitration.³³ It is generally established that the existence of an agreement itself suffices to create arbitral jurisdiction.³⁴ When dealing with the

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29. Paczy v. Haendler & Natermann [1981]1 Lloyd's Rep. 302 at pp.307-308, Dupont Scandinavia AB(Sweden) v. Coastal(Bermuda) Ltd.(Bermuda), Court of Appeal of Bermuda, 9 Nov.1988, YCA (1990) 377, Dodwell & Co. Pty v. Moss Security; Moss Security Pty and Kevin McDonnell, Australia: Federal Court of Australia, New South Wales District Registry, General Division, No. G 649 of 1989, 11 April 1990, YCA (1994) 615, Bakri Navigation Co.Ltd v. Ship Golden Glory, Glorious Shipping S.A., Federal Court of Australia, New South Wales District Registry, General Division in Admiralty, 5 June 1992, No. G199 of 1991, YCA (1994) 624.
 30. Similar result can be achieved from the provisions of Art.8(1) of the Model Law, Arts.1022(1) and 1074(1) of the Netherlands Arbitration Act of 1986, Art.7 of the Swiss Private International Law of 1987, Arts.1458 and 1495 of the French New Code of Civil Procedure, and Art.1027(a) of the German Code of Civil Procedure, Paul Smith Ltd. v. H & S International Holding Inc., [1991]2 Lloyd's Rep. 127.
 31. Robobar Ltd.(UK) v. Finncoild sas (Italy), Corte di Cassazione [Supreme Court], 28 Oct. 1993, no. 10704/93, YCA XX (1995) Italy no.131.
 32. SMG Swedish Machine Group, Inc (US) and Robert W.Schasley (nationality not indicated) v. Swedish Machine Group Inc; SMG Swedish Machine Group AB; SMT SAJO AB; Industries AB; Munksjo AB; Mellanfönd; and Procordia AB (Sweden and US), 123 U.S.D.C., Northern District of Illinois, Eastern Division, 4 Jan.1991, No.90 C. 6081, 1991 US Dist. LEXIS 780, in YCA (1993) 457
 33. Article 1458 of the French Code of Civil Procedure(NCCP), Article 1052(1) of the Netherlands Arbitration Act 1986, Article 186(1) of the Swiss Private International Law Act 1987, Article 21(1) of the UNCITRAL Arbitration Rules, Article 8.3 of the ICC Rules of Arbitration, Article 14.1 of the London Court of International Arbitration Rules, Article 5(3) of the Geneva Convention of 1961, Article 16(1) of the UNCITRAL Model Law on International Commercial arbitration, Article 41(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States. ICC Awards 4367/1984, 4555/1985, 5832/1988, Jarvin, *et.al.*, *Collection of ICC Arbitral Awards, 1986-1990*, (1994)

substantive matter of a dispute in relation to the question as to the existence of an arbitration agreement, the arbitrators are applying substantive law which is not always identical with the law of the courts in the place of arbitration.

Once the jurisdictional questions are settled, if there are valid arbitration clauses which are not identical, the arbitral tribunal has to decide which one would prevail.³⁵ The arbitrators' construction of their authority is to be upheld if the tribunal has acted in accordance with either the law chosen by the parties or determined by the arbitrators, or the law of the place where the arbitration is conducted. Thus, the party seeking to challenge the award should succeed only if it can show that neither under the law applicable to the substantive disputes before the tribunal nor under the law of the place of arbitration would the arbitrators be held to have acted within their jurisdiction.³⁶

In most institutional arbitrations, the parties are restricted as to the time for objection to the jurisdiction of the arbitrator. For example, under the ICC Rules, if there is any objection to the validity of an arbitration agreement, the party wishing to

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34. Shenzhen Nan Da Industrial and Trade United Company Ltd. (nationality not indicated) v. FM International Ltd. (Hong Kong) Supreme Court of Hong Kong, High Court, Miscellaneous Proceedings, 2 March 1991, No.MP1249, 1992 Hong Kong Law Digest C6, in YCA (1993) 377; In a case before a Mexican Court, the Japan Commercial Arbitration Association (JCAA) was held to have sole and exclusive jurisdiction to decide the dispute, to the exclusion of any other jurisdictional means and irrespective of the place of residence of the defendants (Corte Superior de Justicia [Higher Court of Appeals](Fourth Chamber), Federal District, 21 Oct. 1986, Mexico, YCA (1991) 593); Under the Belgian law on the Code of Civil Procedure, challenges to arbitrator's jurisdiction can only be brought under Art.1679(3) of the Code Judiciaire after the rendition of final award on merits.
 35. In German DR Co. v. FR.German Co. and FR German Trustee (in bankruptcy), Award of 16 Nov. 1987 in case no. CG1/86, GDR, YCA (1990), ICC Award 5989/1989, Jarvin *et al*, *op.cit*.
 36. Dalmia Dairy Industries Ltd. v. National Bank of Pakistan, [1978]2 L.I.R. 223 (The *Dalmia Dairy* case); SPP(Middle East) Limited and Southern Pacific Properties Limited v. Arab Republic of Egypt and Egyptian General Company For Tourism and Hotels, 86 ILR 434, 22 ILM 752 (1983), The Annulment by the Court of Appeal of Paris on July 12, 1984, 23 ILM 1048 (1984); Westland Helicopters v. AOI, UAE, Saudi Arabia, Qatar, Egypt, ABH, ICC Arbitral award on the Tribunal's jurisdiction 23 ILM (1984) 1071, 80 ILR 595, Switzerland : Decisions of the Court of Justice of Geneva and the Federal Tribunal (Excerpts) Concerning Award in Westland Helicopters Arbitration, (Annulment of Award with respect to Egypt) [July 19, 1988], 28 ILM 687(1989), 80 ILR 624.

object should raise the objection as to the formal validity of the arbitration clause at the latest in its Answer to the Request for Arbitration.³⁷

Where the arbitrator decides the jurisdictional questions as a preliminary decision, the court of the place of arbitration is entitled to review such a decision.³⁸ In favour of arbitral autonomy, however, an increasing number of countries are severely limiting the ability of judicial review so as to ensure the integrity of arbitration.

An application to set aside the arbitrator's ruling on his jurisdiction does not allow the court to stay the arbitration pending the court decision. In an unusual case, where the same question had been raised in another forum, and where the proceedings involved the same parties and the same dispute, the arbitrators had to decide whether the arbitral proceedings before them should be stayed lest a clash between competing exercises of jurisdiction should take place.³⁹

F. Procedural Powers of the Courts

1. Prevention of Dilatory Tactics

When delay is encountered, both parties are under a common obligation to make application to the arbitrator for directions. In the absence of such an application, the arbitrator is entitled to assume that both parties are content with the sleeping arbitration. Delay could often deliberately be perpetuated not only by a claimant but also by a

37. Article 4 of the ICC Rules; ICC Final Award 6162/1990, in YCA (1992) 153

38. *Westland Helicopters v. AOI, et.al.*, 23 ILM (1984) 1071, 80 ILR 595, 28 ILM 687(1989), 80 ILR 624; *Commissariat a l'énergie atomique - CEA (France) v. Government of the Islamic Republic of Iran (The EURODIF case)*, Swiss Tribunal Federal [Supreme Court], 17 May 1990, YCA (1991) 182

39. An ICSID Tribunal decided that for the interest of international judicial order, either of the tribunals in its discretion and as a matter of comity, should decide to stay the exercise of its jurisdiction pending a decision by the other tribunal. See, *Southern Pacific Properties (Middle East) Ltd. and Southern Pacific Properties Ltd(Hong Kong) v. Arab Republic of Egypt*, ICSID Tribunal Decision on Jurisdiction, 14 April 1988 (The *Pyramids* case), 22 ILM 752, YCA (1991) 22.

respondent, in the prosecution of the reference. Dilatory tactics had, in part, been indirectly encouraged by the powerlessness of arbitrators in the interlocutory process and also by doubts as to the procedural ambit of the supervisory jurisdiction of the courts.

Although an arbitrator may issue interlocutory directions and orders, they are exhortatory only and, in the absence of an express provision in the arbitration agreement or governing laws, an arbitrator has no power to impose sanctions for disobedience. In the circumstances, an arbitrator needs to be empowered by legislation as the courts are.⁴⁰

The question whether the courts have general power to supervise arbitral proceedings was examined by the House of Lords of the United Kingdom in a case where an arbitration was delayed and both parties were responsible for silence and inactivity in proceeding the arbitration.⁴¹ The House of Lords held that the parties owed each other a contractual duty to co-operate in progressing a reference since arbitration was a consensual procedure. It follows from this reasoning that while the claimant was under a duty to pursue his claim, the respondent, bound under a corresponding duty, could not complain of a delay in which he had acquiesced. It was, therefore, held that the reference continued until, if ever, a contractual abandonment of the reference could be inferred.

The opinion of the majority in that case prompted calls for legislation to confer

40. In England, the Arbitration Act of 1979 contains an important provision designed to give 'teeth' to the orders of arbitrators, and generally to counter delaying tactics by the parties. The section 5 of the Act enables arbitral tribunals to apply to the Commercial Court in cases where parties fail to comply with orders made by them within a specified time or, if none is specified, within a reasonable time. See, Thomas, 'The Domestic and International Dimension of Extension Orders,' (1996) 15 CQJ 115. The powers conferred by section 5 of the Arbitration Act 1979 do not, however, include the power of the High Court to dismiss for lack of prosecution because both parties were under a duty to apply to the arbitrator to put an end to the delay which falls into the ambit of section 13A of the 1950 Act.

41. *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] AC 909, p.964.

upon an arbitrator power to dismiss claims referred to him which, due to inordinate delay, he could no longer decide without substantial risk that the outcome would be unfair or unsatisfactory. The House of Lords in this case did not advance the law on the subject and the matter was left to the Parliament of the United Kingdom. Although at least the question was resolved by legislation,⁴² the effect of the decision in the case is that the English Court is not able to furnish any alternative remedy which might, otherwise, provide a remedy for the abuse of stale claims before the courts since arbitration is a private and contractual method of resolving disputes.

2. Consolidation of Arbitrations

The question whether the courts have general power to supervise arbitral proceedings may also be raised in terms of consolidation of arbitrations. String contract arbitration is an example. String contracts involving arbitration are quite often used in certain commercial communities.⁴³ The problems surrounding string contracts arise out of a situation where the outcome of two or more disputes is essentially dependent on what decision is taken by the tribunal or tribunals as to matters of fact or law common to both or all the contracts.⁴⁴

For instance, disputes arising under a chain of charter- parties for the same

42. In England, by section 102 of the Courts and Legal Services Act 1990, section 13A was inserted into the Arbitration Act 1950, giving to arbitrators a power similar to that exercised by the courts. By virtue of section 124(3) and the Courts and Legal Services Act 1990(Commencement No.7) Ord.1991 (S.I. 1991 No.2730) the section came into force on 1 Jan. 1992. Mere delay, however, even delay which is inordinate, inexcusable and prejudicial, will not suffice to justify the dismissal of a contractual claim before the limitation period of six years. See, *James Lazenby & Co. v. McNicholas Construction Co.Ltd.*, [1995] 1 WLR 615; *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968]2 QB 229; *Birkett v. James* [1978] AC 297.

43. Johnson, 'Commodity Trade Arbitration,' in *Handbook of Arbitration Practice* (1993), p.255.

44. Bulow, 'The Revised Arbitration Rules of the Society of Maritime Arbitrator,'(1995)12 J.Int.Arb. 87,p.89. Section 2 of the Rules of the Society of Maritime Arbitrators (SMA) stipulates that the parties agree to consolidate proceedings involving related contract disputes with other arising from common questions of fact or law.

vessel, such as those involving claims regarding speed and consumption; deficiency of winches and cranes; unsafe berths; dangerous cargoes; cargo damage, etc., are ideal subjects for consolidation. The remedy usually proposed is a statutory power to order arbitrations to be consolidated.⁴⁵ In terms of consolidation of arbitrations, national courts have been strict in requiring that there should be consent between all the parties so as to consolidate arbitrations. The *EURODIF* case⁴⁶ concerned a series of disputes involving a number of Iranian and French parties to separate contracts containing different ICC arbitration clauses, some of which provided for arbitration in different locations (namely Paris and Geneva) or failed to mention the site of arbitration.

Notwithstanding these differences, and over the objections of the Iranian parties, the arbitral tribunal constituted by the ICC affirmed its jurisdiction and rendered an award consolidating the proceedings. The award was, however, annulled on the ground that, in France, there could be no consolidation without the consent of the parties.⁴⁷

Those in the majority of the United States Federal Courts of Appeals on the

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45. Section 6B of the Hong Kong Arbitration Ordinance 1982, Netherlands Arbitration Act 1986, Art.1046, Sect.684.12 Florida Int. Arb. Act of October 1, 1986 (1987) ILM 949; The avoidance of inconsistent decisions in a string contract situation can, in theory, be achieved in one of two ways, either (i) by a procedure which refuses to give effect to the arbitration clauses in either contracts and seeks to bring both claims before any court that has jurisdiction over two disputes or (ii) by a procedure which seeks to have both disputes decided at the same time by a common arbitral tribunal. For the procedural purpose of arbitration agreement, the court should be equipped with the power of consolidating multi-party arbitration. It is proposed that there should be some form of third party procedure applicable to arbitration. Both proposals would take as their model the procedural rules applicable to legal proceedings in ordinary court and would apply them, with any necessary modification, to arbitration. See, Note, 'Multi-Party Arbitrations : A Plea for a Pragmatic Piecemeal Solution,' (1991) Arb.Int. 403
 46. ICC Arbitral Awards nos.3683, 5124, and The *EURODIF* case, Swiss Tribunal Federal [Supreme Court], 17 May 1990, YCA (1991) 182
 47. Art.1502, Art.1504 of the French Code of Civil Procedure. In *BKMI Industrieanlagen GmbH v. Dutco Construction Co (Pvt.) Ltd.; Siemens AG v. Dutco Construction Co. (Pvt.) Ltd.*, the French Supreme Court annulled an arbitral decision by arbitrators of consolidating arbitrations appointed by ICC rules on grounds that it would not be deducted from the contract that the parties had agreed to a single tribunal composed of three arbitrators to decide upon a dispute between the three partners. (France: Supreme Court of France, M.Massip, serving as president, 7 January 1992, [1994] ADRLJ 36)

issue of consolidation held the view that in the absence of agreement between the parties, they had no authority to order consolidation. Ever since the 1975 decision in the *Nereus* case⁴⁸, the United States District Court for the Southern District Court of New York following its Appellate Court, the Court of Appeals for the Second Circuit, would routinely order the consolidation of disputes involving similar legal or factual issues arising under separate but related contracts.

In the *Boeing* case⁴⁹, Boeing and Textron were in arbitration with the United Kingdom Government pursuant to two distinct agreements, neither of which contained a provision to consolidate. The Court of Appeal refused to force consolidation of disputes without the consent of all the contractually involved parties. It has held that the District Court may not order consolidation of arbitration proceedings arising from separate agreements to arbitrate, without prior agreements by all of the parties involved to allow such consolidation. The Appeals Court found that the *Nereus* case was distinguishable from the case before it, because in *Nereus*, all three parties had signed the addendum which incorporated arbitration clauses. This decision should definitely cause the courts of the Southern District not to automatically order consolidation as it used to do.⁵⁰ The *Boeing* court, however, left *Nereus* untouched to the extent that the Court of Appeal for the Second Circuit might order consolidation relied on equitable powers of the court.⁵¹

48. *Compañía Espanola de Petróleos, S.A. v. Nereus Shipping S.A.*, 527 F.2d. 966 (2d.Cir. 1975)

49. *The Government of the United Kingdom of Great Britain and Northern Ireland v. The Boeing Company and Textron, Inc.*, 998 F.2d.68 (2d.Cir. 1993),1993 US App.Lexis 15955 (1993 AMC 2906)

50. For the practical discussions, see, Institute of International Business Law and Practice, ICC (ed), *Multi-party Arbitration* (1991)

51. *North River Ins. Co. v. Phila. Reinsurance Corp.*, 63 F.3d. 160 (2nd Cir. 1995)(*The North River* case). In the *North River* case, the parties including reinsurers from both side of the Atlantic were involved with disputes on various claims in connection with reinsurance contracts. In December 1988, North River commenced arbitration proceedings against the US reinsurers, and on Oct. 3, 1989, served a separate notice of intention to arbitrate against the London reinsurers. Each Treaty at issue contained same arbitration clauses. North River sought an

II. Governing Laws

A. Generally

Arbitration is founded in contract and it follows that parties to an international commercial contract have the autonomy to agree in advance to a regime for settling any disputes that might arise out of, or in connection with, their agreement.

The parties who have elected to resolve their differences by arbitration are free to nominate how the arbitration is to proceed, where the arbitral tribunal is to be seated, what is the procedural law to be applied to the arbitration, and what is the substantive law of the dispute to be referred to the arbitration.

Foreign parties submit themselves to the law of and to arbitration in a country for whose law and administration they may in a general sense have the highest regard but whose history, culture, tradition, language, method of contracting, legal reasoning and rules of substantive law and procedure are quite different from their own.

It is supposed that when they invoke given rules and law they envisage those rules and law being applied with a broader brush and with an eye to established international usage and the need to accommodate the particular factors that are peculiar to transactions involving a foreign element. So also with rules of procedure and evidence.⁵² The whole success of the international arbitral process depends largely on such procedural rules and substantive law as are selected by the parties and

order consolidating the proceedings against the US reinsurers and the London reinsurers. An order of consolidating arbitrations was made and based on the *Nereus* decision. The arbitration proceeded on the consolidated basis as ordered, and the arbitration panel rendered a two-to-one award in North River's favour. When the award was brought for confirmation, the US and London reinsurers were successful in vacating the award on the strength of the *Boeing* decision. In the appealed case, however, the Court of Appeal reversed the decision with the effect of vacating the award on grounds that *Boeing* did not change the law of the Second Circuit; that the reinsurers chose not to appeal the district court's original order consolidating the arbitrations; and that a balance of the equities required the award to stand.

52. Goode, *op.cit.*, pp.2-3.

complemented by international Conventions. The arbitration law of individual countries, in its most basic and elementary sense, is the law which governs the conduct of proceedings before arbitrators or an arbitral tribunal - the mode of proceeding by which a legal right in relation to subject matter in dispute is enforced, as distinguished from the law which gives or defines the right - but it also governs what can properly be called rights to arbitrate, including not only such rights as the right to present his case in due process and the right of appeal for the aggrieved party to the arbitration before a national court, but also the right to refer the dispute to arbitration.

It is firmly established that full effect is given to agreements to submit future disputes as well as existing disputes to arbitration. Once the agreement to arbitrate is found valid, operative, and capable of being performed, there is no way for one of the parties to avoid the agreement to arbitrate.⁵³ The court cannot refuse to recognise, subject to its arbitrability condition, agreements for arbitration valid and enforceable under the proper law of the agreement.

In terms of the procedural nature of arbitration law, the parties are voluntarily yielding to the arbitrator by authorising him to exercise powers of conducting the arbitration. One factor of arbitration proceedings is that the arbitrators are free to determine how the procedure is to be designed, unless otherwise provided for by mandatory provisions or by the parties themselves through agreement on certain rules to govern the proceeding.

In the present century legislative reform has been introduced in response to spontaneous initiatives from the commercial community by strengthening the enforceability of arbitration agreements and awards made under them, by improving the procedures for constituting the arbitral tribunal, by enhancing the procedural powers of the arbitrator, and by conferring auxiliary procedural powers on the court.

53. Sedco, Inc. v. National Iranian Oil Company and Iran, 25 ILM 629, The *Pyramids* case, 22 ILM 752, YCA (1991) 22, Westland Helicopters v. Arab Organization for Industrialization, 23 ILM 1071, YCA (1986) 127, Soleh Boneh Int.Ltd.v. Uganda, YCA (1976) 133.

B. Law of Arbitration and Law of Court

1. Flexible Application of Rules in Arbitration

The arbitrators are the masters of arbitral procedures.⁵⁴ From their nature, the rules for the arbitration are custom tailored to the parties' needs. It seems that procedural law of arbitration is restricted to the provision of institutions of arbitration and rules of procedure best fitted to the fair, economical and expeditious adjudication, in accordance with the law, of those disputes which the parties choose to submit to arbitration.

The basic test of the success of arbitral rules is whether they can establish a workable arbitral institution and then keep the proceedings on the way until either the arbitrators issue an award or the parties agree on one. As in the past, many of the most useful innovations in arbitral procedure are likely to come about as the result of initiatives by those actively concerned in the practice of arbitration, rather than as the result of legislative intervention. By way of example, evidence may need to be taken from a witness abroad by telephone in an arbitration or may be based on a 'paper hearing' rather than a 'live hearing'.⁵⁵

It is unusual for arbitrators to issue a detailed set of procedural rules at the beginning of an arbitration. It is equally unusual for arbitrators to adopt a particular set of pre-existing rules. When making procedural decisions, they base them on their experience in state courts or in other arbitrations. In arbitrations held in Civil law countries, there is no obligation to follow a procedural pattern more or less resembling the procedure practised in State courts.⁵⁶ In order to increase the speed of arbitration,

54. Heuman, 'Transplanting Arbitral Processes into Civil Procedure - A Swedish Perspective,' (1988) CJK 156, p.161.

55. In *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corporation YCA* (1994) 802, a New York State Court confirmed an award, holding that the arbitrator's decision to decide solely on documentary evidence was reasonable and did not constitute misconduct.

what is sometimes called the 'inquisitorial' approach to arbitral procedure may be preferred for arbitrators of Common Law backgrounds.⁵⁷ Thus, the procedural pattern usually adopted by arbitration practitioners has borrowed very much not only from Civil law traditions, but from Common law traditions as well.⁵⁸

2. Influence of Rules of Civil Procedure

Whatever provisions are included as substitutes for the procedural rules of a court, it must be recognized that, by choosing arbitration over adjudication, the parties are for the most part relinquishing the use of a court's coercive power, accepting in its place the substantially lesser power possessed by an arbitrator and the good faith of the parties involved.⁵⁹ That is not an unfettered freedom as the procedure adopted by the parties must comply with any mandatory rules and public requirements of the place where the arbitration is held, as well as with the 'due process' provisions within the applicable international Conventions.⁶⁰

56. Trappe, 'Arbitration Procedure in Germany and in England - Some Comparative Remarks,' (1994) 60 JCI Arb 3, 165

57. The *Bremer Vulkan* case, [1981] AC 909, p.964.; It can be submitted that the rules of law governing court proceedings and arbitrations must in all respects be the same. For instance, even though Scotland has adopted the Model Law into the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the Civil Evidence (Scotland) Act 1988 expressly applies the normal rules of evidence to arbitrations unless the disputants have agreed otherwise. While it is correct that the dynamics of a jury trial required a predominantly oral hearing, and involved a relatively passive judge, who left the deployment of the evidence and arguments to the lawyers, there is no reason why this procedural framework should be imposed on arbitration as a matter of law. See, Steyn, 'England's Response to the UNCITRAL Model Law of Arbitration,' (1994) Arb.Int.1, p.7; Miller, 'A Reason Why Arbitrators Should Get Cross,' (1994) NLJ 1381.

58. As in the case of the general conduct of arbitral procedure the differences between Anglo-American and Roman legal traditions are now tending to blur. Reymond, 'Civil Procedure and International Arbitration,' in *Conference on the Reform of Commercial Arbitration Procedure*, London, 1994. Borris, 'Common law and Civil law : fundamental differences and their impact on Arbitration,' [1995] ADRLJ 92.

59. Ehrenhaft, 'Effective International Commercial Arbitration,' (1977) 9 Law & Pol'y Int.Bus. 1191, p.1207.

60. Kolkey, 'Attacking Arbitral Awards : Rights of Appeal and Review in International

It is common that arbitration law contains few procedural rules, whereas the rules of civil procedure before the courts in individual countries provide a detailed regulation of proceedings in a number of areas. Traditionally ordinary civil proceedings serve to demonstrate the effectiveness of the law; they provide the opportunity for the judges to perform their function of interpreting, clarifying, developing and, of course, applying the law.

Certain regulations will limit the period available for the parties to choose whether they are going to act or not. Claimants want the period for the choice to be as long as possible, whilst respondents want it to be as short as possible. The various forms of litigation are designed in such a way that a reasonable balance has been made between the requirement that the litigation be simple, fast and inexpensive while at the same time upholding the guarantees of due process. These reveal the tension between justice and certainty which is a feature of any developed legal system.⁶¹ It is necessary that the expectations of claimants must be balanced against those of respondents, and the demand for justice must be balanced against the demand for certainty.

The rules of procedure for arbitration just like those for ordinary national court typically permit or require certain specified acts on the part of one or other of the parties to the arbitration. It is, however, hardly possible to incorporate civil litigation significantly in every respect of arbitration and at the same time provide improved guarantees that the cases will be correctly decided.⁶²

C. Common Law and Civil Law Jurisdiction

It is natural that arbitration law in a given country is influenced by procedural rules for the courts in that country. Whether the rules of procedure usually do more

Arbitrations,' (1988) 22 Int.Law.693.

61. McGee, 'A Critical Analysis of the English Law of Limitation Periods,' (1990) CJQ 366

62. Heuman, *op.cit.*, p.161.

than create choices or a sequence of choices largely depends on traditional legal backgrounds. In principle, in Civil law countries, all kinds of evidence can be submitted to the arbitration which takes place in such countries. It is the principle in most Civil law countries that the parties may freely present evidence which they consider relevant.⁶³

The assessment of evidence can be simplified in part by placing the entire responsibility for the presentation of evidence on the parties; burden of proof rules are applied as soon as it is completely clear that the facts in issue have been proven.⁶⁴ In Civil law countries, Anglo-American rules of evidence concerning admissibility are probably unrelated to the arbitral proceeding.⁶⁵ That procedural law merely creates choices is most evident in the Common law style of procedure where the court's power to act of its own motion is restricted.⁶⁶

It is understood that relations between the judiciary and the arbitral community in England are close. Thus, it seems that those involved in English arbitration cannot be certain as to the meaning of the words used in a statute without the benefit of litigation.⁶⁷ This problem of interpretation is compounded by the belief of some judges that in complex areas of the law, the matter is best left to development by the courts. It is not surprising to see that a move to change civil procedure has come from the commercial community, increasingly appalled by the delays and the high cost of litigation and of arbitration.⁶⁸

63. Harris, 'The Reform for Arbitration Process : Maritime Arbitration,' Reymond, 'Civil Procedure and International Arbitration,' in *Conference on the Reform of Commercial Arbitration Procedure*, London, 1994.

64. Heuman, *op.cit.*, p.167.

65. Tackaberry, 'Evidence at the Hearings and in Documents-only Arbitrations,' in *Handbook of Arbitration Practice* edited by Bernstein and Wood, p.221, Mitchell-Heggs, 'Proof of Evidence in French and Common Law Jurisdictions,' (1995)23 IBL 8, 379

66. Jolowicz, 'On the Nature and Purposes of Civil Procedural Law,'(1990) CJQ 262, p. 269.

67. Miller, *op.cit.*, p.1382.

D. Application of Governing Laws

1. Freedom of Choice

In an international contract, involving parties of different nationalities, the choice of law is free, and the parties may freely decide that their relations are to be governed by the law of their choice, even though the case has no connection whatsoever with the country of the law.⁶⁹ It is common that the law of the merits is different from the law of the place of arbitration.⁷⁰

One of the most difficult tasks arbitrators in an international arbitration face is the choice of substantive law to be applied in a given dispute.⁷¹ This may happen even where the parties have expressly chosen the proper law of the contract.⁷² The arbitration

68. Marriott, 'The Politics of Arbitration Reform,' (1995) 14 CJQ 125, p.127.

69. ICC Award 4629/1989, in YCA (1993) 16, ICC Award 6076/1989; Although the parties had chosen *lex mercatoria* and general principles of law, it was noted that *lex mercatoria* still must not be seen as identical with the notion of public policy itself. ICC Award 4761/1987 noted by Jarvin in Jarvin *et al.*, *Collection of ICC Arbitral Awards*, 1986-1990, (1994)

70. The adoption of complete party autonomy in the choice of law leads to the result that the governing laws can be split at the parties' convenience. The concept of splitting the proper law is not welcomed, because it is considered that the role of the proper law of the contract is to enable the parties to know the nature and extent of their obligations which can only be discovered by reference to a given legal system. It is, therefore, considered that a split proper law undermines the whole function of the proper law which is to provide a basic infrastructure of legal rules in order to determine the existence, nature and extent of the parties' legal obligations, and provides no alternative basis for resolving the competing claims of legal systems. See, McLachlan, 'Splitting the Proper Law in Private International Law,' (1990) BYIL 311, p.314.

71. Comment, 'General Principles of Law in International Commercial Arbitration,' (1988) 101 Harv.L.Rev.1816, p.1817. Nowadays, noticeable unity as to applicable law in international transaction has been reached by arbitration clauses included in standard forms which contain consistently and increasingly a certain municipal law or particular institutional rules. Thus, the choice of law or forum, either expressly or impliedly, in an arbitration or jurisdiction clause reduces the uncertainty arising from the existence of divergent national law.

72. Even though arbitrators are authorised to apply *lex mercatoria* and act as *amiables compositeurs*, the question may be raised about the nature and extent of the powers of arbitrators acting as *amiables compositeurs*, in addition to the powers deriving from the application of the general principles of international commercial law or of *lex mercatoria*. A

agreement which is independent from the main contract may be governed by its own distinctive proper law different from the proper law of the contract.

Within the arbitral stage where the differences between Civil law and Common law are involved, although some of them are dissipated or substantially reduced in international arbitration, in some way, the arbitrator has to resolve the choice of law dilemma and come out with a decision, be it Civil law or Common law.⁷³

Both the New York Convention and most municipal laws that would apply independently of that Convention require that the arbitrators shall have acquired their jurisdiction pursuant to an arbitration agreement which is valid according to its proper law.⁷⁴ The principle of the contractual autonomy of the parties to determine the law applicable to the substance of their disputes is recognized by Art.V(1)(a) of the New York Convention⁷⁵ and by Art.VII(1) of the 1961 Geneva Convention.⁷⁶ Art.V(1)(a) of the New York Convention avoids the difficulty of determining the applicable law in the light of the private international law of the court of enforcement. It also recognizes the autonomy of the will of the parties to the extent that they may choose the law applicable to the arbitration agreement, regardless of the place of arbitration, the nationality of the parties, or any other factor.⁷⁷

further question is whether the individual situation and circumstances justify his making use of such power. See, ICC Award 3267/1984.

73. This approach is in conformity with certain rules of arbitral institution such as ICC, since Art.13(5) of the ICC Rules of Arbitration which provides that the arbitral tribunal shall take account also of the provisions of the contract and of the relevant trade usages. See, ICC Final Award 6527/1991, YCA (1993) 45.

74. It is necessary to determine to what extent the law of the place of arbitration governing international arbitration applies to decide on the issue of the validity of arbitration agreement and enables an arbitral tribunal to refuse to apply foreign legal provisions according to which the dispute would not be arbitrable. See, ICC Final award 6162/1990, in YCA (1992) 153.

75. Art.V(1)(a) provides that “ ... or the said agreement is not valid under the law to which the parties have subjected it”

76. ICC Final Award 6379/1990, in YCA (1992)

77. Contini, ‘International Commercial Arbitration : The United Nations Convention on the

The law governing a contract is to be found by reference to the parties' intentions, whether they are expressed or implied⁷⁸, or to the system of law with which the contract has its closest connection.⁷⁹

There is the law governing substantive issues which is about the relationship between the parties and directly related to the disputes themselves. Where there is a contract containing an arbitration agreement, unless there is any express stipulation on the proper law of the arbitration agreement, it is normal that the validity of the arbitration agreement will be governed by the proper law of the contract.⁸⁰ As a result, the choice of the proper law of the contract may influence the interpretation of the agreement to arbitrate. It is almost a maxim that the *lex loci* is necessary to find what is the proper law of the contract, or what law is the most closely and really connected with the contract. The *lex loci* is regarded differently from the *lex fori*. Whereas the former governs the substance of a contract, the latter regulates the procedural effect of the contract.

In addition, there is the law of the locus of transaction (*lex loci contractus*) which governs the issue whether the parties to the transaction are bound. If the parties are bound to their transaction, then the tribunal may look to the parties' choice of the place of arbitration and the law of the place of arbitration governs the conduct of the

Recognition and Enforcement of Foreign Arbitral Awards,' (1959) 8 AJCL 283, p.300

78. Sapphire Int.Petroleum Ltd. v. National Iranian Oil Co. (1967) ILR 136, The *Texaco* case (1979) ILR 389, ICC Award 3572/1982, 4145/1983, 1984, 1986
79. ICC Award 5460/1987, Rogers, 'Contemporary Problems in International Commercial Arbitration,' (1989) 17 IBL 154, p.158; Howard, 'Floating Choice of Law Clauses,' (1995) LMCLQ 1, p.5. The principal office and the habitual residence of seller at the time in question, and the place of conclusion of sales contracts were considered in deciding applicable law in ICC Award 6281/1989, and the place of performance of contract was considered in ICC Award 4650/1985.
80. Cia Maritima Zorroza S.A. v. Sesostris S.A.E.(The "Marques de Bolarque"), [1984]1 Lloyd's Rep. 652, 653; The National Thermal Power Co.Ltd. v. The Singer Co., (1991) YCA, 574, (1993) YCA 404.

arbitration as additional indications of the appropriate law to resolve the controversy.⁸¹

Against the background of the theoretical structure of the governing law of the contract, it is often suggested that the governing laws of the arbitration are *lex arbitri* which governs the validity of the arbitral process itself, and the *lex loci arbitri*, i.e. the law of the place of arbitration the mandatory norms of which can not be derogated from by the arbitrators.⁸² Quite often the *lex arbitri* is the same as the *lex loci arbitri*. Thus, the usual view is that the *lex arbitri* is the law of the place of arbitration (*lex loci arbitri*), and that that law applies to the validity of the process and the arbitral tribunal is subject at least to its mandatory rules.⁸³

2. Place of Arbitration

a. *Lex loci arbitri*

Although it is sometimes argued that the control function of international arbitration has been shifted from the place of arbitration to the place of enforcement⁸⁴,

81. ICC Final Award 6268/1990, YCA (1991) 118

82. Alsing Trading Co.Ltd. v. The Greek State (1956) ILR 633, Sapphire Int.Petroleum Ltd. v. National Iranian Oil Co. (1967) ILR 136, BP v. Libyan Arab Republic (1979) ILR 297, Wintershall v. Qatar, (1989) ILM 798, Park, 'The *Lex Loci Arbitri* and International Commercial Arbitration,'(1981)32 ICLQ 21,p.23.

83. The reference to a foreign arbitration law can only be construed as an inclusion by reference into the arbitration agreement of those norms of the foreign law which do not intervene the mandatory norms of the *lex loci arbitri*, the foreign arbitration law being 'contractualized.' ICC Final Award in case no. 6248 of 1990, in YCA (1994) 124.

84. Paulsson, 'Arbitration Unbounded : Award Detached From the Law of Its Country of Origin,' (1981) ICLQ 358, p.375. In *SEEE v. Socialist Federal Republic of Yugoslavia*, the arbitral award of 1956 was a decision by default which was subsequently vacated by a Swiss court on the ground that the award was outside the meaning of Swiss (Vaud) law and consequently did not fall within the jurisdiction of the arbitral tribunal. In 1965, a request of the SEEE for an *exequatur* in France was rejected by the President of the Tribunal de Grande Instance de la Seine by decision of 15 July 1965. The Paris Court of Appeal held on 23 June 1966 reversed the order of the President of the lower Tribunal on the ground that by suspending a decision the President of the Tribunal had not rendered a decision within the limits of the powers conferred on him by Article 1021 of the Code of Civil Procedure. See, Stuyt, 'Misconceptions About International (Commercial) Arbitration,'(1974) NYIL 35, pp.37-42.

and that holding judicial intervention to a minimum is to be viewed positively by the international commercial community,⁸⁵ it is not to be denied that the place of arbitration plays an important role in deciding the substantive and procedural governing law of international arbitration, and further enforcement of its potential award. It appears that when it comes to the arbitration itself, that is almost invariably governed by the law of the country in which it takes place.⁸⁶

If there is no express applicable law to the dispute between the parties, the law of the place of arbitration applies to decide the applicable law to the dispute.⁸⁷ In choosing the proper law of the contract, however, it is already established that the selection of a particular forum for arbitration will not always result in that law of the forum being the proper law of the contract.⁸⁸ Unless the parties make an express choice of procedural law to govern their arbitration, the fact that the parties have agreed to a place of the arbitration is only a strong pointer that implicitly they must have chosen the laws of that place to govern the procedures of the arbitration.⁸⁹ In an English case where standard-form contracts between the parties, printed in English, contained clauses indicating the parties' intention upon contracting to settle all disputes by arbitration, the

85. For the integrity of arbitration, the courts are expected to be in favour of the need of the international commercial system for predictability in the resolution of disputes. The *Mitsubishi* case, 473 US 614.

86. Beck, 'Floating Choice of Law Choices,' [1987] LMCLQ 523, p.529; ICC Award 5029/1986.

87. ICC Final Award 6283/1990, in YCA (1992); In *Sojuznftexport v. Joc Oil Ltd.* (1990) YCA 384 where all disputes were to be referred to arbitration in Moscow without specifying the proper law of the agreement, the Bermuda Court decided that the Soviet law was the proper law of the arbitration agreement to decide the scope of the agreement.

88. *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* [1971] AC 572, [1970] 3 WLR 389; Thomas, 'Commercial Arbitration : Arbitration Agreements as a Signpost of The Proper Law,' [1984] LMCLQ 141.

89. In ICC Award 5505/1987, the choice of the ICC Rules was regarded as well sufficient to settle the problems of procedure (Art.II of the Rules for the ICC Court of Arbitration) and the choice of Switzerland as the place of arbitration implied the application of the Swiss mandatory provisions.



contract did not, however, expressly stipulate which body of procedural or substantive law was to be applied upon arbitration. The issue raised in the case was to decide whether the law governing the arbitration procedure was English or Scots law.

According to English law at the time when the case was initiated, an arbitrator had to state a case for the decision of the court if the question was one of law and the application was made before or on the giving of the award. The stated case procedure was, however, unknown to Scots law until it was introduced in 1972.⁹⁰ In this case, the English Court of Appeal, relying heavily on the parties' selection of the English standard-form contracts, held English substantive and procedural law applicable upon arbitration.

Upon the case being appealed, the House of Lords reversed the Court of Appeal in the case, holding that the arbitration was bound by the procedural, but not the substantive, law of the forum (Scotland) selected by the parties.⁹¹ Although the decision of the case emphasised the difference of the procedural law of the arbitration from the substantive law of the contract, the question whether the substantive law of the arbitration is the same as the substantive law of the contract remains.⁹²

b. Possibilities of Split Procedural Law of Arbitration

In the *Peruvian Insurance* case,⁹³ Kerr, L.J. made a decision, which is

90. In accordance with Clause 29 of the Arbitration (Scotland) Bill of 1996, the stated case procedure will be repealed when the new law is in force.

91. *James Miller & Partners, Ltd. v. Whitworth Street Estates (Manchester), Ltd.*, [1970] AC 583, [1970]2 WLR 728(H.L.)

92. As discussed below, since in English law it is well established that an arbitration clause assumes the character of a distinct contract, albeit ancillary and subordinate to the contract in which it is embedded, viz. that arbitration agreement is separated from the contract containing the arbitration agreement, there may be a possibility of a separate and distinct proper law from that of the contract which governs the validity, creation and effect of the agreement to arbitrate.

93. *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* [1988]1 Lloyd's Rep. 116

considered by one commentator as an ingenious invention⁹⁴, that a choice of *lex arbitri* implied a choice of the place of arbitration. The Court of Appeal in the case faced the question of the splitting of the *curial* or procedural law of the arbitration.⁹⁵

This decision seems the other side of the decision made in the *James Miller* case⁹⁶ where the House of Lords of the UK. reversed the decision of the Court of Appeal that the proper law of the contract had been English law and that the arbitration had been governed by English law. Pursuant to the speech by Lord Guest on the side of the majority of the decision, there was no question as to any split in the proper law of the contract or any variation of the proper law. Since all the proceedings took Scots form and the arbiter plainly indicated that he was following Scots procedure, then in the absence of any protest, the parties were taken to have agreed that the arbitration would be governed by the *curial* rules of Scotland. On the one hand, the *Peruvian Insurance* case stressed the importance of agreed procedural law of the arbitration for the choice of the place of arbitration. On the other, the *James Miller* case based the choice of the *curial* law of arbitration upon the agreed place of arbitration.

94. Hunter, 'International Arbitration : *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru*,' [1988] LMCLQ 23, p.24.

95. The case arose out of a dispute between a Peruvian insurance company(the insurers) and a Peruvian shipping company(the shipowner) under a Hull policy covering four vessels classed with different classification Societies in America, Europe and Japan. The plaintiff shipowner appealed the decision of the court below that under the hull insurance policy issued by the defendants the parties had agreed that any arbitration was to be governed by English law but that any such arbitration was to be held in Lima with the result that an application for the appointment of an arbitrator pursuant to the Arbitration Act, 1950, was rejected. While accepting the theory that parties might agree that an arbitration should be held at a place or in country X but subject to the procedural laws of Y, the Court pointed out that under the principles of English law, which rested upon the limited territorial jurisdiction of English Courts, an agreement to arbitrate in X subject to English procedural law would not empower English Courts to exercise jurisdiction over the arbitration in X. As a conclusion, the Court held that in the absence of some express and clear provision to the contrary, an agreement that the *curial* or procedural law of an arbitration was to be the law of X had the consequence that X was also to be the "seat" of the arbitration. The *lex fori* is then the law of X, and accordingly X is the agreed forum of the arbitration.

96. *James Miller v. Whitworth*, [1970] AC 583

The courts in the countries using the Code Napoleon formula have sometimes held that the law governing the substance of the dispute prevail over the control of the *lex loci arbitri*.⁹⁷ Taking this attitude, the courts of India are causing unfortunate results in the international arbitration community since the substantive law of many existing agreements between Indian parties and foreign parties is Indian law, as the Indian Government often made (and continues to make) this a condition of its approval of agreements. For the future, it would seem that parties who wish the provisions of the New York Convention to be applicable to the execution of a foreign award in India, should specify that the arbitration clause is governed by a law other than Indian law.⁹⁸

In *Union of India v. McDonnell Douglas*⁹⁹ where the dispute was referred to arbitration under a contract¹⁰⁰, the question was raised whether the arbitration between the parties was to be governed by the laws of India or the laws of England. The court in the case opined that the English Acts over an arbitration in England could not be excluded by an agreement between the parties to apply the laws of another country, or

97. Guedj, 'The Theory of the *Lois de Police*, A Functional Trend in Continental Private International Law - A Comparative Analysis with Modern American Theories,' 39 AJCL (1991) 661

98. Khindria, 'Enforcement of Arbitration Awards in India,' (1995)23 IBL 11, p.12; So long as the arbitral agreement is not an attempt to avoid fraudulently an arbitrability restriction, it is not clear what interest the country whose law governs the substance of the dispute has in whether the case is arbitrable. Where a state needs to protect a national interest or its citizens from the effects of the arbitration of a particular type of dispute, it can usually do so by refusing to decline jurisdiction over such a case even in the face of an arbitration clause. Otherwise, the place where the arbitration is due to take place has probably the greatest right to stop an arbitration whose occurrence offends its public policy. See, Samuel, 'Arbitration in Western Europe - A Generation of Reform,' (1991) Arb.Int. 319, pp.352-353.

99. *Union of India v. McDonnell Douglas*, [1993]2 Lloyd's Rep. 48.

100. Article 11 of the agreement provided that the agreement was to be governed by, interpreted and construed in accordance with the laws of India. The agreement also contained an arbitration clause (Art.8) in the following terms: "The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any reenactment or modification thereof. ... The seat of the arbitration proceedings shall be London, United Kingdom."

indeed by any other means unless such was sanctioned by those Acts themselves. It was held that by their agreement the parties had chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which were concerned with the internal conduct of their arbitration and which were not inconsistent with the choice of English arbitral procedural law.

By the decision of *Union of India v. McDonnell Douglas*, the English court allowed an arbitration under the procedural governing law of the arbitration agreement different from the law of the place of arbitration which was rejected in the *Peruvian Insurance* case for the reason that the parties would not intend to conduct arbitration in Lima under the English Arbitration Acts as a procedural law of the arbitration, but under the supervisory jurisdiction of the Peruvian court. Nevertheless, the decision would not mean that there is a split of the procedural governing law of the arbitration, since the law of the place of arbitration controls the application of the different legal system agreed by the parties.

At any rate, if the different procedural law of the arbitration is allowed, but in a way restricted by the law of the place of arbitration, to exist, the question may be raised whether the law of the place of arbitration may be circumvented by the choice of a convenient place of arbitration different from the legal place of arbitration.

Within the territorial jurisdiction, the court of the place of arbitration would be very slow to interfere in the conduct of the arbitration in its jurisdiction if the parties agreed to apply different procedural law to the arbitration from the law of the place of arbitration in dealing with discretionary matters. Outside its jurisdiction, the extent that the court of the place of arbitration exercises its supervisory jurisdiction over the conduct of the arbitration which happens in a convenient place of arbitration may vary from jurisdiction to jurisdiction according to the policy towards arbitration within the jurisdiction.

c. Nationality of Award

(1) New York Convention

In accordance with Art.V(1)(e) of the New York Convention, the enforcement of an award may be refused when the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. While provisions of Art.V(1)(e) parallel those in Art.V(1)(a) granting the parties the power to pick the law governing their agreement, the matter of setting aside the award is an entirely different matter.¹⁰¹ There may arise a question whether the enforcement of an arbitral award should be in conformity with the law of the place of arbitration. As a starting point, another question may be raised whether 'the competent authority of the country ... under the law of which [the] award was made' in Art.V(1)(e) of the Convention, refers to the country the substantive law of which, as opposed to the procedural law of which, was applied by the arbitrators. In essence, the question is about which nationality the eventual award will take.

There are two approaches to determine the nationality of an award. The one is that the *situs* of the award, without regard to such factors as the nationality of the parties, the subject of the dispute and the rules of arbitral procedure, would determine if the award was 'foreign' under the Convention. The other is that like the attitudes taken by France and Germany in drafting work for the Convention of 1958, the nationality of an award should be determined 'by the law governing the procedure.'¹⁰² The

101. Quigley, 'Accession by the U.S. to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,' (1961) 70 Yale L.J. 1049, p.1069.

102. It is conventional to say that Civil law countries define an award as 'foreign' on the basis of the procedural governing law of the arbitration. Once the categorisation has been made, the question would follow whether the French law should not be applied to the effect of the award which was made within France under foreign procedural rules. The traditional definition on 'foreign' award for the Civil law countries does not, however, always work since in some cases the French courts follow the so-called territorial standard as well as procedural law standard. See, *Air Forces Command of the Islamic Republic of Iran v. Bendone Derossi International*

compromise between these two conflicting approaches is made in Art.I of the Convention.

To meet the conditions for the New York Convention of 1958 to apply to an arbitral award, according to Art.I of the Convention, the first criterion is whether the award is made in the territory of a state other than the state where the recognition or enforcement of such award is sought. If the award meets this criterion, it will be recognised as 'foreign award' to which the Convention is to apply.

The second criterion is whether the award is not regarded as a domestic award by the state where the enforcement or recognition is sought. The non-domestic criterion is not a limitation on the territorial test. The Convention applies to all awards rendered outside the enforcing state *and* to awards rendered inside the enforcing state if that state does not regard the award as domestic. For instance, an award, rendered in the United States will not be considered a domestic award when strictly domestic issues are not involved; the Convention will then be applied.¹⁰³ Therefore, although an award may be regarded as a 'domestic' award in a territorial sense, the Convention shall apply to the award when the State characterises the award as 'foreign.'¹⁰⁴ Thus, the standards for

Ltd., 86 ILR 96.

103. Domke, 'The U.S. Implements of the U.N Arbitral Convention,' (1971) 19 AJCL 575, p.577.

104. In *Bergesen v. Joseph Muller Corp.*, 710 F.2d. 928(2d Cir.1981), a Norwegian shipowner under a charter party chartered three vessels to a Swiss corporation and the charter party contained an arbitration agreement which provides for arbitration in New York. When faced with the argument of the charterer that the Convention did not cover enforcement of the owner's award because the award was neither territorially a 'foreign' award nor an award 'not considered as domestic' within the meaning of the Convention, the Court of Appeals of New York agreed with the charterer that the award was not territorially a 'foreign' award, since it was rendered in New York. However the court held that the award was 'not considered as domestic', since this phrase denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g. pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. A similar situation is presented in *Productos Mercantiles v. Faberge, USA*, 23 F.3d. 41 (2nd Cir. 1994). In the case, the arbitration award rendered in New York was considered a non-domestic award, since it involved a dispute between two foreign parties. As a result, the award was enforceable under the Inter-American Convention on International Commercial Arbitration which was given effect in the United States by Chapter 3

arbitration falling within the Convention include the territorial concept and special local definitions of 'domestic'.

Plainly, an award 'under the law of which' refers to an award made in country A under the arbitration law of country B. In the Federal Republic of Germany, for example, an award made in that country under French arbitration law, should the parties have so provided, would be regarded as a foreign award. The Convention apparently overrides the German policy that an award rendered anywhere under German procedural law is a domestic German award and the Italian position that any award between Italians is domestic.¹⁰⁵

The basic thrust of the New York Convention was to limit the broad attacks on foreign arbitral awards that had been authorized by the predecessor Geneva Convention of 1927.¹⁰⁶ Any suggestion that a court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration would defy the logic both of the Convention debates and of the final text, and ignores the nature of the international arbitral system. Thus, the language in Art.V(1)(e) '... under the law

of FAA.

105. Quigley, *op.cit.*, p.1061; In 1994, Italy has practically re-written the procedural rules of arbitration. The Italian legal system treats arbitrato (arbitration) as special proceedings, in the framework of the rules of the Supreme Court. The new legislation deals only with arbitrato, in the technical sense of the word, and not with arbitrato irrituale (words which literally mean "not subject to the rules of court proceedings"). The Italian Parliament has adopted a line close to the UNCITRAL Model Law. Therefore, the parties, except for mandatory compliance with the rules of due process, are free to apply or not to apply the other statutory procedural provisions and, in general, have great freedom in establishing how the proceedings should be conducted. See, Rubino-Sammartano, 'New International Arbitration Legislation in Italy,' (1994) J.Int.Arb. 77.

106. Under Article 3 of the Geneva Convention, a court could refuse enforcement, or stay the proceeding if it was established that, there was a ground, other than those specified in the Convention, to contest the validity of the award under the law of the state where arbitration had taken place. It was possible, therefore, to challenge the enforcement of an arbitral award not only for failure to comply with the conditions prescribed in the Convention, but also for not being in conformity with the law of the place of arbitration. Instead, under the New York Convention, a court may refuse enforcement only on any of the grounds listed in Articles V and VI.

of which ...' refers exclusively to procedural and not substantive law, made more precisely, to the regime or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract.¹⁰⁷ It is now clear that the decisive factor is the seat of arbitration rather than the rules applied by the arbitral tribunal.¹⁰⁸

The Convention was given effect in the United Kingdom by the enactment of the Arbitration Act of 1975. It is understood that under the 1975 Act a Convention award¹⁰⁹ is defined in wholly territorial terms.¹¹⁰ With regard to the effect of the foreign arbitral awards under the Convention, or the Convention award under the Arbitration Act, the question may be raised whether domestic arbitration law is to be applied to supervise the conduct of arbitration. A complicated situation arose where the arbitrator of an arbitration which had been conducted under English law, in London, signed and dated an award in the arbitration abroad, in France.¹¹¹ The House of Lords observed that the award was made where it was signed, by applying orthodox English doctrine on the subject.

107. As a result, only the courts of the *situs*, or forum of arbitration have jurisdiction under the Convention to vacate the award. See, *International Standard Electric Corporation v. Brides Sociedad Anonima Petrolera, Industrial y Comercial* 745 Fed.Supp.(1990) pp. 172-182, in YCA(1992) p.638.

108. Delaume, 'Reflections on the Effectiveness of International Arbitral Awards,' (1995) 12 J.Int.Arb. 5, p.17; In an unusual case such as *The NTPC* case, (1991) YCA, 574, (1993) YCA 404, where arbitration proceedings were commenced in London and an interim award was rendered to the effect that English law applied to the arbitral procedure, the Supreme Court of India, reversing the decision of the High Court which held that the award was foreign, deciding that the award was domestic because the proper law governing the arbitration agreement was indeed the law in force in India, and the competent courts of India must necessarily have jurisdiction over all matters concerning arbitration.

109. By s.7(1), 'convention award' is meant an award made in pursuance to an arbitration agreement in the territory of a state, other than the United Kingdom, which is a party to the New York Convention.

110. Thomas, 'Reflections on Recent Judicial Development of The Concept of a Convention Award,'(1992) CJQ 352, p.357.

111. *Hiscox v. Outhwaite* [1992]1 AC 562, [1991]2 Lloyd's Rep. 1, [1991]3 WLR 297

It was disputed whether the other English arbitration Acts of 1950 and 1979 could be applied to the award which was signed in France and regarded as 'Convention award' under the 1975 Act. It was accepted that the court of the seat of the award and the court having jurisdiction over the conduct of the arbitration were most likely to be the same, but that the court of enforcing the award was different from the court of the seat of the award. In the unusual circumstances in which the place of making the award was different from the seat of arbitration, their Lordships could not find anything in the New York Convention compelling exclusion of the arbitral jurisdiction of the seat of the arbitration which happened to be the same as the jurisdiction of the enforcing country.¹¹²

The crucial point shown by the decision in this case is that the law of the place of arbitration which is normally the law of the place of 'making' the award is recognised to be different from the law of the court having jurisdiction over conducting the arbitration.¹¹³ The effect of this decision is that the place of arbitration is to be determined by where the arbitrators put their signatures and the dates of the award even though the place of arbitration was already agreed by the parties.¹¹⁴

(2) Model Law

Where the court of the place of arbitration is invited to exercise its power in relation to an arbitration which is to take place in its jurisdiction, the first point to be

112. *Hiscox v. Outhwaite*, [1991]3 WLR 297, p.306.

113. The striking historical association between the *lex loci arbitri* and the curial law has been severed and it is now accepted that no objection exists in principle to an arbitration conducted at a particular seat being governed by a foreign curial law. See, Thomas, *op.cit.*, p.361.

114. The possible criticism against this method of deciding the place of arbitration is that it could be by mere chance that the award is made at the place which appears in the document, perhaps because the arbitrators were spending their holidays there. This could be worse where the signing happens on a train, on board a plane, or on a ship on the high seas. See, Szászy, *Comments*, (1966) AJCL 658, p.666; Timmons, 'Where is an Arbitration Award Made, and What Are the Consequences,' (1992) 58 JCI Arb. 124, p.125; Broberg, 'The Interpretation of Section 5(2)(b) of the English Arbitration Act 1975,' (1994) J.Arb.Int.119, p.120.

dealt with by the court is whether its law is appropriate to apply to an arbitration of an international nature. If a court is to apply the Model Law, it should make a decision as to whether an arbitration can be categorised as international. Pursuant to the provisions of Art.1 of the Model Law, an international arbitration is determined on territorial basis¹¹⁵ and the agreement of the parties.

Although the initial point to decide whether an arbitration was to be considered international according to the provisions of the Model Law was a place of business test, the arbitration would be international, despite both parties having their places of business in the same state, if any place where a substantial part of the obligations of the commercial relationship was to be performed or the place with which the subject-matter of the dispute was most clearly connected was outside the state in which the parties had their place of business.¹¹⁶

With regard to the place of arbitration, the Model Law makes it clear that the place of arbitration agreed by the parties, failing such agreement, then decided by the arbitral tribunal¹¹⁷ must appear on the award.¹¹⁸ The parties could decide under Art.20(1) of the Model Law that a Model Law country is to be the place of arbitration, but for convenience the arbitral tribunal might sit exclusively in another country, for

115. According to Art.1(2) of the Model Law, the provisions of the Model Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of the Model Law state. The standards of the application are similar to those of Art.176(1) of Swiss PIL and Art.1073(1) of the Dutch Act. This standard is recommended to be widely copied. See, Samuel, 'A Critical Look at the Reform of Swiss Arbitration Law,' (1991) Arb.Int. 27, p.32.

116. The *Fung Sang* case, [1992] ADRLJ 93, Ananda Non-Ferrous Metals Ltd. v. China Resources Metal and Minerals Co. Ltd. [1993]2 HKLR 348, Hong Kong : High Court of Hong Kong (Kaplan J.), Case Law on UNCITRAL Texts (CLOUT) Case 58, YCA XX (1995); The standards of the application of the Model Law would be advantageous to an English decision where the Court of Appeal found itself in a tangle determining whether the Arbitration Act 1950 applied to an application to appoint an arbitrator for a case that might have been partly heard in Peru. See, The *Peruvian Insurance* case, [1988]1 Lloyd's Rep. 116.

117. Art.20(1) of the Model Law

118. Art.31(3) of the Model Law

instance, Paris, France, where indeed the award is signed. However, the award should state that the Model Law country is the place of arbitration, and indeed for all practical intentions and purposes it will be the place of arbitration.

For procedural matters, the Model Law allows the parties to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings.¹¹⁹ In accordance with Art.19(1) of the Model Law, the parties are allowed to agree on applying less strict technical rules of evidence than those prevailing in the place of arbitration. Failing agreement by the parties to the dispute as to procedural law, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.¹²⁰ Likewise, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable without the parties' agreement on the substantive law of the dispute.¹²¹

It should be emphasised that most of the provisions of the Model Law apply only if the parties have failed themselves to deal with the matter addressed, while considerable autonomy is also given to the arbitral tribunal in the absence of direction by the parties. Where an arbitrator acts in uncontrollable excess of his jurisdiction until he has published his award, it is only then that the courts can intervene, with the result that the whole proceeding may have been a waste of time and costs.

Art.36 (1)(a)(v) of the Model Law follows exactly the same language of Art.V(1)(d) of the Convention, and thus inherits the complicated problems which have been raised under the 1958 Convention. Art.V(1)(d) of the Convention has proved to be quite a troublesome provision.¹²² If the tribunal follows the agreement of the parties

119. Article 19(1) of the Model Law

120. Article 19(2) of the Model Law

121. Article 28(2) of the Model Law; As regards the relationship between Arts. 19(2) and 28, it may be considered that the former provision would govern the issue, so that the tribunal's discretion would not be affected by the choice of substantive law to be made under Art.28.

122. Its terms are a compromise between two quite different points of view. One advocated contractual freedom to designate an arbitral procedure independent of the law of any country,

rather than mandatory norms of the place of the award, there is a strong possibility that the award will be set aside, with the result that recognition or enforcement will be refused under Art.36(1)(a)(v). On the other hand, if it ignores the agreement of the parties and adheres to such mandatory norms, then it runs the risk that a court may adopt the most popular interpretation of Art.36(1)(a)(iv) and refuse recognition and enforcement on the basis that the arbitral procedure was not in accordance with the agreement of the parties.

Whether transnational procedural rules exist or not, or ought to exist if they do not yet exist, the criticism is made that they are not concerned with harmonisation (i.e. the conscious assimilation by nations of their domestic laws) but on the contrary repudiate the notion that local domestic arbitration law has any place in international commercial arbitration.¹²³ In fact, the Model Law takes a position in the face of such a worry. After all, the Model Law does not cover all of the matters raised in ordinary arbitration. It simply means that in those areas not covered by the Model Law, the existing domestic law continues to apply.

3. *Lex mercatoria*

The development of the law merchant¹²⁴ is based on the contractual nature of arbitration agreements by which two private parties or merchants may contract outside of municipal law.¹²⁵ There does not seem to be any conceptual impediment to

while the other argued for the complete subject of the arbitral procedure to the law of the country where the award was made. See, Quigley, *op.cit.*, p.1051.

123. Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response,' (1989) 17 IBL 161, p.163.

124. The law merchant is spoken of under a number of names, including international, transnational, or supranational commercial law; international customs or usages; general principles of international commercial law; and *lex mercatoria*.

125. Notes, 'The New Law Merchant: Legal Rhetoric and Commercial Reality,' (1993) L.&Pol'y.Int.Bus.589, p.599; ICC Interim Award in Case no. 6149 of 1990, YCA XX(1995) p.42. In the case, the Korean claimant had argued that the application of Korean law would be impracticable and that the arbitrators should therefore directly choose the law to be applied to

developing and applying rules of *lex mercatoria arbitralis* to questions relating to the validity of arbitration agreements, the propriety of procedural rules, and the validity and enforcement of arbitral awards.¹²⁶

Arbitral tribunals applying general principles have reached decisions from which it is clear that, as in any given national law, the principle of the binding force of contracts is not the only rule governing the resolution of contractual disputes.¹²⁷

In the circumstances, *lex mercatoria*, *amiable compositeur*, and harmonisation of substantive law tend to be grouped together because they are all seen as desirable alternatives to the old-fashioned ideas that a contract must be governed, and disputes under it decided, by its own substantive 'proper' law.¹²⁸

If the arbitration agreement under the Convention of 1958 is not valid under the law to which the parties have subjected it, however, the award of the arbitration could not be recognised in the country where the recognition of the award is sought.¹²⁹ This

the contract. Such a choice, according to the claimant, should lead to the application of the "so-called *lex mercatoria*" which, in its turn, would essentially mean the application of the Vienna Convention on the International Sale of Goods of April 1980; and that, where said convention would be silent, French law subsidiarily would have to be applied as the law in effect at the seat of the arbitration. With the most closest connection with Korea as a place of making contract, according to the principles derived from the Korean, Jordanian, Iraqi and French conflict of laws rules, the tribunal held that Korean law should be applied as one and the same proper law of all the contract in question since the parties had not made any agreement on the application of the Vienna Convention of 1980.

126. Smit, 'A-national Arbitration,' (1988) 63 Tul.L.Rev. 629, p. 632; *Compania Valenciana de Cementos Portland S.A. (Spain) v. Primary Coal Inc (US)*, Cour de Cassation [Supreme Court], 22 October 1991, France, YCA (1991) 143, YCA (1993) 137

127. Gaillard, 'Thirty Years of *Lex Mercatoria* : Towards the Selective Application of Transnational Rules,' (1995) 10 ICSID-FILJ No. 2, 208, p. 214; Wilkinson, 'The New *Lex Mercatoria* : Reality or Academic Fantasy?' (1995) 12 J.Int.Arb. 2, 104

128. Mustill, *op.cit.*, p. 162.

129. In *Dallal v Bank Mellat* [1986] QB 441, [1986] 2 WLR 745, there was no arbitration agreement in the ordinary sense, because the Tribunal was created by treaty embedded in the Algiers Declarations. Furthermore, the English court in the case rejected the submission that public international law could be the proper law of an arbitration agreement. Having denied that international law can govern an arbitration agreement between private parties, the court held that the award might, nonetheless, be recognised as an award of a statutory arbitration whose

would be definitely so if the recognition is sought before the court of the *lex loci contractus*.

Where the arbitrator decided the dispute by applying the customs of international trade, or, in other words, the *lex mercatoria*, as being the most appropriate law, the unsuccessful party may challenge the decision in order to have the award based upon the *lex mercatoria* set aside on grounds that on the one hand the arbitrator did not adhere to the reference which was, in the absence of a choice of law by the parties, to decide according to the law indicated by the conflict of laws rules that he considered to be appropriate, and on the other hand, that the arbitrator had done this by deciding that the dispute was governed by the customs of international trade, to the exclusion of all national law.¹³⁰

Under the Model Law, as regards the substantive law of a dispute, the arbitral tribunal is required to decide the dispute in accordance with such rules of law as are chosen by the parties.¹³¹ The Model Law would have gone even further to allow the parties to invoke as the governing law “general legal principles or case law developed in arbitration awards” but ultimately it was agreed that this was “too far-reaching”.¹³²

Under the Model Law, however, the controversial concept of *amiable compositeur* is expressly acknowledged. According to Art.28(3) of the Model Law, the

‘statutory’ competence could be derived from international law. The decisions of the tribunal are recognised in England and can presumably be enforced by action, not as arbitral awards, but as judgments of a competent foreign tribunal. See, Mustill and Boyd, *Commercial Arbitration* (1989), p.43.

130. Norsolor v Pabalk Ticaret Ltd. Sirketi, (1982) YCA 312, (1983) YCA 362, Norsolor v Pabalk Ticaret Ltd., (1984) YCA 154, France : Court of Cassation Decision in Pabalk Ticaret v. Norsolor (Enforcement of Arbitral Awards : *Lex Mercatoria*) (Oct.9, 1984), 24 ILM 360 (1985). The French Supreme court found that the application of the *lex mercatoria* had been justified. It pointed out that the award did not violate mandatory provisions of either Turkish or French law.

131. Article 28(1) of the Model Law

132. Davidson, ‘International Commercial Arbitration in Scotland,’ [1992] LMCLQ 376, p.388.

arbitral tribunal shall decide *ex aequo et bono* or *amiable compositeur* only if the parties have expressly authorized it to do so.¹³³ In a Model Law country where an arbitration by an *amiable compositeur* would not be regarded as arbitration, the effect of Art.28(3) is of course to ensure that amiable composition is permitted in international commercial arbitrations in that country.¹³⁴ It is submitted that any foreign award decided by reference to *lex mercatoria* for the substantive law of dispute, would be recognised and enforced in Contracting States to the Convention, particularly where the parties had agreed to such a substantive legal regime at the outset. It follows that the provisions of the Convention apply to an arbitral award which is not made under a specific national law.

While there has been much controversy as to whether the Convention applies to 'delocalised' or 'international' awards¹³⁵, recent decisions whose recognition was sought before the United States courts show that an award made under international law falls under the ambit of the New York Convention. These latest decisions in connection with the awards rendered by the Iran-US Claims Tribunal exemplify that an award without any conventional meaning of *situs* may be recognised and enforced under the New York Convention.¹³⁶

133. Similar provisions can be found in national laws such as Art.1054 of the Dutch Act of 1986, Art.187 of the Swiss PIL of 1987, and Art.1474 of the French Code of Civil Procedure.

134. Davidson, *International Commercial Arbitration -Scotland and the UNCITRAL Model Law* (1991), p.151.

135. Shindler, 'Arbitration Still Bound,' (1986) 102 LQR 500

136. Although awards by Iran-US Claims Tribunal were made in the Netherlands, they cannot be considered as 'Dutch' since they are not subject to Dutch law. In *Iran v. Gould*, 887 F.2d 1357, (9th Cir. 1989), the court held that "if the parties choose not to have their arbitration governed by a national law, then the losing party simply cannot avail itself of certain of the defense in subparagraphs (a) and (e)." Thus, the court concluded that an award did not need to be made "under a national law" for a court to entertain jurisdiction over its enforcement pursuant to the Convention. See, also *Iran v. Avco*, 980 F.2d.141 (2nd Cir. 1992) ; *SEEE v. Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 Oct. 1973, 5 NYIL. 290; van den Berg, 'Proposed Dutch Law on the Iran-United States Claims Settlement Declaration, A Reaction to Mr.Hardenberg's Article,' (1984)12 IBL 341; Tebbens, 'A Facelift for Dutch Arbitration Law,' (1987) NILR 141; Lake and Dana, 'Judicial Review of Awards of the Iran-US Claims

Nowadays there are an increasing number of national courts which are willing to enforce even those awards explicitly made under the law merchant.¹³⁷ The growing tendency shows that the Convention has come to be construed so as to recognise and enforce an arbitral award which was not made under any national laws.¹³⁸

4. Transnational Procedural Law

a. Choice of Procedural Law

Whereas the proper law of arbitration agreement may be categorised as substantive, the governing law of the conduct of arbitration is considered as procedural. The process of choosing the procedural law is quite similar to that of the substantive law of arbitration.¹³⁹ In an international contract, the parties could make the agreement that any disputes would be governed by one law, but that the procedures to be adopted in any arbitration under that agreement would be governed by another law.¹⁴⁰

Tribunal: Are the Tribunal Awards Dutch?' 16 Law & Pol Int'l Bus. 755 (1984); Lewis, 'What Goes Around Comes Around : Can Iran Enforce Awards of the Iran-US Claims Tribunal in the US?' 26 Colum.J.Trans.L. 515 (1988); Bedermann, Note, (1990) 84 AJIL 556; Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution,' (1990) 84 AJIL 104.

137. *Norsolor v Pabalk*, (1982) YCA 312, (1983) YCA 362, (1984) YCA 154, 24 ILM 360 (1985); *The Compania Valenciana* case, (1991) YCA 143; In *DST v. Rakoil*, [1988] 2 All ER 833, upholding the arbitrators' choice of "internationally accepted principles of law governing contractual relations" as the proper law, the court held that there was no national public policy objection to the enforcement in England of an arbitration award made in Switzerland according to the *lex mercatoria*. This decision was approved in the *Channel Tunnel* case. See, *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] AC 334, [1992] 2 WLR 741, [1993] 2 WLR 262. (H.L.(E.))
138. A.J. Van den Berg contends that the Convention was intended for the enforcement of awards made in a state other than that where enforcement is sought, and never to cover an a-national award. See, Notes, 'Party Autonomy: The Choice of Place,' (1992) Arb.Int. 83, p.84. But a U.S. Court of Appeals has rejected van den Berg's position. See, *Ministry of Defence of the Islamic Republic of Iran v. Gould, Inc.*, 887 F.2d 1357, (9th Cir. 1989), *cert.denied*, 494 US 1016, S.Ct 1319, 108 L Ed 2d 494 (1990), (1990) YCA 81; *Iran v. Avco*, 980 F.2d 141 (2nd Cir. 1992)
139. Art.19 of the Model Law, Art.1036 of the Dutch Act, Art.182 of the Swiss PIL, Art.1460 of the French Code of Civil Procedure.

Since the place of arbitration restricts the range of powers available to the parties or the tribunal, the law governing the arbitration procedure, where the parties have not already specified such law in the contract, will be the law of the place where the arbitration is held.¹⁴¹ Where the parties have not specified the place of the arbitration, the procedural law, *prima facie*, will be that of the proper or substantive law of the contract.

b. Delocalisation Theory

Regarding procedures, arbitrators enjoy considerably greater flexibility. The rules of procedure applied in international tribunals frequently do not follow the pattern of any national legal system. Instead, international arbitrators are developing a procedural system of their own.¹⁴² While most states allow parties some flexibility to choose the procedural rules applicable to the arbitration¹⁴³, however, domestic courts have traditionally retained the power to review agreements or awards that violate fundamental procedural guarantees before the rendering of an award.

There is a growing consensus among theorists and practitioners to free arbitrators from any local rules of procedure or, of private international law and, in particular, from the procedural law of the country where the arbitration has its seat.¹⁴⁴ It is implicit, in this view, that the procedural aspect of arbitration, in a broad sense, is

140. *Union of India v. McDonnell Douglas*, [1993]2 Lloyd's Rep. 48, p.50.

141. *James Miller v. Whitworth*, [1970] AC 583; *The Dalmia Dairy case*, [1978]2 L.R. 223

142. Smit, *op.cit.*, p.1311.

143. Baker and Davis, 'Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal,' (1988) 23 Int.law. 81, p.83.

144. Mann, 'England Rejects 'Delocalised' Contracts and Arbitration,' (1984) 33 ICLQ 193, p.197; Paulsson, 'The extent of independence of international arbitration from the law of the *situs*,' in J.Lew (ed), *Contemporary Problems of International Arbitration* (1987) p.141, at 148. The attempt may be coming from the competition between countries aspiring to provide venues for economically attractive international arbitrations. Paulsson, 'Third World Participation in International Investment Arbitration,' (1987) 2 ICSID Rev.-FILJ 19.

differentiated from the substantive aspect of arbitration, the contract to arbitrate from which the procedural aspect arises.

One of their prime purposes is to break the links between the arbitral process and the courts of the country in which the arbitration takes place. It is, therefore, premised on the belief that the laws of the arbitral *situs*, the location where the award is to be rendered, should not interfere with the process by allowing judicial review of either the arbitration agreement or award; that is, appeals, from any aspect of the transnational dispute, should take place at the enforcement stage, if at all.¹⁴⁵

According to the extreme theory of advocating the freedom of procedural arbitration law from the *lex loci arbitri*, the institution of international commercial arbitration is an autonomous entity of justice which is developing legal principles of its own, independent of all national courts and all national systems of law. Institutionalised arbitration tends to lead thinking in this field, and since it can be said to be much more adaptable to transnational ideas than *ad hoc* arbitration, it may well be that, through international arbitration institutions, such ideas may be easily accepted by the users of those institutions.

Those bodies can be seen as offering a framework for international arbitration, and a continuity of doctrine and practice, as an alternative to the existing mechanisms of any state system of arbitration law.¹⁴⁶ Nevertheless, only a minority of awards of arbitration administered by the bodies are published, and very few of these are concerned with procedure.¹⁴⁷ Further, most procedural rulings will involve the arbitrator's personal judgment concerning the most effective way to conduct a particular

145. *SEEE Award*, *ARAMCO Award* (1963) 27 ILR 117, *TOPCO/Calasiatic-Award* (1979) 17 ILM 3, *LIAMCO Award*, (1981) ILM 1, *AMINOIL Award* (1982) ILM 976, von Mehren and Kouridis, (1981) 75 AJIL 476, Comment, 'The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration out of Control?' (1991) Tul.L.Rev. 1661, p.1689.

146. Mustill, 'Transnational Arbitration in English Law,' (1985) Current Legal Problems 133, p.137.

147. Collins, 'Privacy and Confidentiality in Arbitration Proceedings,' 30 Tex.Int'l L.J. 121(1995), Chutze, 'The Precedential Effect of Arbitration Decisions,' (1994) J.Int.Arb. 69, p.73.

dispute, and the institution will rarely yield the kind of guidance on general principles which can safely be transferred to a different context.¹⁴⁸

c. Practical Roles of National Courts

In terms of the function of the court of the place of arbitration, choice of arbitral forum is usually made by the parties having considered the possibilities of assistance and intervention of the local court, and the choice has the effect of inviting the application of the law of the place of arbitration.¹⁴⁹ It follows that the local court of the place of arbitration is implied to have jurisdiction to intervene in the procedural matters of the arbitration which is to take place within its jurisdiction. In fact, the degree of involvement of the local courts in arbitration cases situated in that jurisdiction is regarded as the single most significant element in attracting or discouraging international arbitrations to a particular jurisdiction.¹⁵⁰

Even where the parties to an international arbitration are free to choose procedural laws of arbitration, they should observe at least the mandatory rules of the seat of the arbitration. At an extreme, some argue that every aspect of arbitration should be checked against the background of *lex fori*. It is a fallacy, however, to

148. Even in institutional arbitrations, the burden on the way of managing arbitral proceedings does not fall on administering institution but on arbitrators themselves. See, R.Smit, 'An Inside view of the ICC Court,' (1994) *Arb.Int.*53, p.58. As a result, the period of a case depends on how the arbitrators act as a master of arbitral procedure. See, Schneider, 'The Reform of Commercial Arbitration Practice: Major Construction Cases and How they are dealt internationally,' in *Conference on the Reform of Commercial Arbitration Procedure*, London, 1994.

149. Berger, *International Economic Arbitration* (1993), pp.98-99.

150. The understanding of the complicated interaction of recourse initiated at the seat of the arbitration and enforcement actions before foreign courts as well as a profound knowledge of the recourse provisions of the various national arbitration laws has the same importance for the parties' effective 'forum shopping' when drafting an arbitration clause so as to avoid possible enforcement obstacles. Gaillard, 'The UNCITRAL Model Law and Recent Statutes on International Arbitration in Europe and North America,' (1987) 2 *ICSID Rev.-FILJ* 424, Notes, 'Party Autonomy: The Choice of Place,' (1992) *Arb.Int.* 83, p.84.

suppose that arbitral proceedings must take their authority from the local municipal law of the country within which they take place, although most legal systems may seek to exercise some measures of control over arbitration proceedings taking place in their country whether or not their *curial* law applies. The restrictions of *lex fori* are limited to the grounds of refusal of the recognition or enforcement of an award under the New York Convention. As a result, the negotiating effect of the *lex fori* doctrine is avoided even though the machinery of enforcement remains a procedural matter and is properly governed by the *lex fori*.¹⁵¹

It frequently happens, that an arbitration clause provides for one or other of two or more venues.¹⁵² It may be contended that that makes the arbitration clause void for uncertainty or otherwise unworkable for the reasons that such a clause is based on ‘floating choice of law.’

Theoretically and practically the proper law of the agreement to arbitrate is regarded as different from the proper law of the contract. The floating choice of the proper law of the agreement to arbitrate would be given effect, even though the floating choice of the proper law of the contract may be negated by the court of the place of arbitration.¹⁵³ It is recognised by courts in most leading countries of international commerce that the governing laws for the agreement to arbitrate with one or more foreign elements would not necessarily be the same as would be applied in a contract with only domestic matters.¹⁵⁴

Furthermore, policy reasons strongly support the validity of an arbitration clause

151. Art.V(1),(2) of the Convention; Art.36 of the Model Law

152. *Star Shipping A.S. v. China National Foreign Trade Transportation Corporation* (The “Star Texas”), [1993]2 Lloyd’s Rep. 445. In *The Star Texas* case, the parties had concluded a charter party containing an arbitration clause which provided that “Any dispute arising under the charter to be referred to arbitration in Beijing or London in defendant’s option.”

153. Briggs, ‘The Validity of “Floating” Choice of Law and Jurisdiction Clauses,’ (1986) LMCLQ 508

154. Baxter, ‘International Conflict of Laws and International Business,’ (1985) ICLQ 538, p.561.

containing a floating *curial* law since in an institutional arbitration, the place of arbitration is not decided until the institution administering the arbitration chooses a place for that arbitration.¹⁵⁵ This conclusion will be subject to the notion that the procedural law governing the arbitration is almost invariably the law of the place where the arbitration is held.

d. Limits of *Curial* Jurisdiction

The spirit of the New York Convention is that even where the jurisdiction of a national court in a Contracting State may be invoked, the exercise of the jurisdiction is most likely to be restricted by the Convention.¹⁵⁶ Besides the New York Convention, there are a variety of procedural rules and Conventions for international arbitration seeking, as a priority, to limit *curial* intervention of the courts of the place of arbitration. Amongst them is the Model Law.

One of the key concepts of the Model law is that of limited and clearly defined instances of court intervention in the arbitration process, with a curtailed right of appeal from a court decision sought during the pendency of the arbitral proceedings. In the Model Law, the most conspicuous provision is Art.5 which expressly states that in matters governed by that Law no court shall intervene except where such is provided in the Model Law.

The approach of the Model Law, which allows limited prompt recourse to court during the arbitral proceedings, but simultaneously permits the arbitration to go forward,

155. The parties are free to stipulate for arbitration subject to the rules of, for example, the ICC, leaving the venue of the arbitration to be fixed by the arbitral institution or by the arbitral tribunal. It could not be argued that that was an indication that the parties intended the *curial* law of the arbitration to depend upon wherever the arbitration ultimately took place.

156. Fincantieri- Cantieri navali italiani SpA and Oto Melara SpA (Italy) v. M (Switzerland) and Arbitral Tribunal, Tribunal Fédéral [Supreme Court], 23 June 1992, YCA XX (1995), Switzerland no.24. Although the arbitrability of the dispute in the case was questioned before the Swiss court as a result of the UN embargo resolutions of 1990 and 1991 against Iraq, which had been incorporated in both Swiss and Italian law, it was held that the arbitral tribunal correctly decided that it had jurisdiction over the dispute between the parties.

represents a balance between the potential for delay through dilatory tactics of a recalcitrant party, and the futility and high cost of arbitral proceedings in which the award is ultimately set aside by the court.¹⁵⁷

The goals of recent legislative revisions and the drafting of a Model Law are consistent with the aspirations of proponents of international arbitration who have sought not so much to exclude judicial review as to circumscribe such review to very limited grounds. However, the fact remains that no code or guidelines can realistically expect to cover or pre-empt every possible permutation of curial intervention. International arbitration proponents have a realistic scepticism as to whether courts acting in a reviewing capacity at the seat of arbitration can resist the temptation not only to apply their own(national)judgment, but also to treat the arbitral tribunal as an inferior national court. Such intervention by a reviewing court would be inconsistent with the aspirations of international institutions of arbitration and the intention of parties having recourse to them.¹⁵⁸

5. Foreign Mandatory Law

a. Generally

International contracts usually contain choice of law clauses or governing law clauses as well as arbitration clauses. It is very common practice, in both international business litigation and international commercial arbitration, for the parties to make an agreed selection with regard to the law or jurisdiction (or both) to govern the substance of their dispute, and for effect to be given to such choice. While the arbitration clause as a whole is meant to provide the method of settling disputes arising out of the contract, the choice of laws clause lays down which law is to be applied to the

157. Hoellering, 'The UNCITRAL Model Law on International Commercial Arbitration,'(1986) Int.Law.327, pp.330-331.

158. Craig, 'International Ambition and national Restraints in ICC Arbitration,' (1985) 1 Arb.Int.49, p.80.

relationship between the parties to the contract.¹⁵⁹ In so far as the issue of arbitrability is concerned, the parties may agree to apply mandatory legal provisions in accordance with the law of the state that has promulgated them.

When claims or defences are raised in an international arbitration on the basis of a state's mandatory rules of law such as antitrust, competition, securities law or the like, the arbitrators may be required to consider not only whether such claims or defence are arbitrable and the law to be applied in making such a determination, but whether the law in question is to be applied in the first place.¹⁶⁰ It is often suggested that the matter of arbitrability is to be decided with reference to the law governing the validity of the arbitration clause which, in most cases, is found to be the same as the law applicable to the contract in which the arbitration agreement is contained.

b. Contractual Limitation and *Ex Officio* Application

Assuming that the matters concerned can be said to be within the scope of the arbitration clause, an issue may arise as to whether the arbitrators, who derive their authority from the agreement of the parties, are competent to apply legal rules to the merits that may fall outside the law, if any, chosen by the parties in this regard. The

159. Ever since the U.S. court started biasing the interests of international harmony and trade more favourably rather than those of protecting its citizen, the court allows that forum-selection clauses in international contracts or international arbitration contracts are "*prima facie* valid" and will be enforced save in "unreasonable" circumstances. This has been considerably achieved where enforcement and recognition of an arbitral award are sought before courts of the Contracting States to the New York Convention of 1958. See, Kling, 'Greater Certainty in International Transactions Through Choices of Forum?' (1975) 69 AJIL 366, p.371; *Roby v. Corporation of Lloyd's*, 996 F.2d. 1353 (2nd Cir.1993); *Bonny v. Society of Lloyd's*, 3 F.3d. 156 (7th Cir. 1993); *Hugel v. Corporation of Lloyd's*, 999 F.2d. 206 (7th Cir. 1993); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d. 727 (1st Cir. 1994), *affirmed*, 515 US ___, 115 S Ct. 2322, 1995 AMC 1817, 34 ILM 1615.

160. There may be several different laws to be applied in deciding the issue of arbitrability : the law governing the contract; the law governing the subject matter in question; the law governing the arbitration agreement; the law of the place of arbitration; the law of the place of enforcement of the award. See, Lazareff, 'Mandatory Extraterritorial Application of National Law,' (1995) 11 Arb.Int. no.2, 137

issue whether the arbitrators are allowed to invoke, *ex officio*, the matter of a claim's arbitrability would seem no less challenging.¹⁶¹

There may arise an issue in this regard as to whether some claims based on public order, as formulated, fall within the purview of the arbitration clause, as drafted. An arbitration agreement or award relating to a matter that is not capable of settlement by arbitration may not be recognised or enforced or may be set aside.¹⁶²

With respect to this issue, it has been argued, and there may be arbitral awards to this effect that it would be contrary to the arbitration agreement, and therefore outside the arbitrators' authorities, to apply legal rules external to the *lex contractus*, particularly if chosen by the parties. From the contractual nature of arbitration, the parties are agreed to limit the power of the arbitrator to the determination of the 'merits' and, thus, not to oblige the arbitrator to decide questions of arbitrability in accordance with the law chosen by the parties, if any, matters of arbitrability.

Art.85 of the Treaty of Rome provides for competition rules of the European Community. With respect to national public laws, the rules on competition of the Treaty are of public order and part of the public policy of the Community. Pursuant to Art.85(2) of the Treaty of which provision is according to the relevant jurisprudence of the competent Court of Justice of the European Community directly applicable in that any party is entitled to request a national court to ensure the protection of its rights arising out of the Treaty provision, all agreements between undertakings, decisions by associations of undertakings and concerted practices in violation of Art.85 of the Treaty are prohibited and shall be automatically void. If the arbitrator finds that the agreement by the parties to arbitrate in whole or in part contravenes Art.85 of the Treaty, the

161. Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration,' (1995) NILR 81, Werner, 'Application of Competition Laws by Arbitrator - The Step Too Far,' (1995) 12 J.Int.Arb. 21.

162. Arts. II(1), V(2)(a) of the New York Convention, Art. 34(2)(b)(i) of the UNCITRAL Model Law

consequence thereof is likely to be that the relevant clauses are deemed void and unenforceable.

As far as the *ex officio* application of competition rules is concerned, the issue of arbitrability under the EU competition rules is itself arbitrable and thus the relevant provisions must be taken into account and the decision falls within the jurisdiction of the arbitrator as defined by the arbitration agreement of the parties. The arbitrators must, therefore, on their own initiative investigate whether the agreement comes under the prohibition of Art.85(1) of the Treaty.¹⁶³

It is argued that arbitrators have neither the investigative powers such as those of the EC Commission nor the possibility of asking the EC Commission for an opinion as the national courts of EC Member States can.¹⁶⁴ Since the control of arbitration is founded on an agreement of the parties, the consensual arbitrator does not qualify as a tribunal within Art.177 of the EEC Treaty and cannot make a reference to the European Court. Only the national courts in Member countries, if they considered it necessary, could make a reference on an EEC law question that had arisen in the arbitration to the European Court.¹⁶⁵ For this reason, where the power is given to the arbitrator to determine the issue of arbitrability in terms of competition or antitrust laws, that may make it extremely difficult for an arbitral tribunal to make an opinion, which involves sophisticated economic and legal assessments of market situations, under these circumstances.¹⁶⁶

Where violations of EC competition law alleged in an arbitration may at the

163. ICC Award 4132, (1985) YCA 49

164. Nordsee v. Reederei Mond, Case 102/81 [1982] ECR 1095, Bebr, 22 CMLR (1985) 489, Alexander and Grabandt, 19 CMLR (1982) 413, Schmitthoff, 'Arbitration and EEC Law,' [1987]24 CMLR 143, Marc Rich & Co. A.G. v. Societa Italiana Impianti P.A. (The "Atlantic Emperor"), [1989]1 Lloyd's Rep. 548, [1992]1 Lloyd's Rep. 342 (C.A.) & (Q.B.(Com.Ct.)).

165. Schmitthoff, *Ibid.*; Nordsee v. Mond, *Ibid.*

166. Hochstranger, 'Choice of Law and 'Foreign' Mandatory Rules in International Arbitration,' (1994)11 J.Int.Arb.57, p.78; Werner, *op.cit.*, pp.25-26.

same time be the subject of an investigation by the EC Commission or other legal proceedings, an arbitral tribunal may have to consider, first of all, whether to suspend the arbitration proceeding pending the completion of the related state proceedings. In practice, ICC arbitrators generally appear reluctant to suspend pending proceedings unless this is requested or acquiesced in by both parties or otherwise ordered by a judicial authority.¹⁶⁷

c. Practical Considerations

Arbitral legislations in many jurisdictions as well as the principal international arbitration Conventions¹⁶⁸ tend to approach the problem of arbitrability in terms of the law applicable at the place of arbitration or the place of enforcement of award (rather than with reference to the law governing the arbitration agreement or the contract or, if different, the *lex causae*, i.e., the law of the subject matter).¹⁶⁹ This in effect brings the matter as to the application of mandatory laws which must be taken into account before an award is to be enforced. The place of arbitration, however, may not even be chosen by the parties, but be designated instead by an arbitration institution, such as the ICC.¹⁷⁰ In the circumstances, it is difficult to see why the law of the place of the arbitration should have any bearing on the determination of a matter's arbitrability.

Although the arbitral tribunal's award may ultimately be subject to review by the national courts at the place of enforcement of the award,¹⁷¹ the courts of a country

167. Schwartz, *op.cit.*, p.41.

168. Article V(1)(a), (d), (e) and Article V(2) of the 1958 Convention and Article VI of the 1961 Geneva Convention

169. Schwartz, *op.cit.*, p. 26; Shown in Articles 176, 177(2) of the Swiss PIL, the Swiss law position with respect to the issue of arbitrability, appears to mandate the application of Swiss law in determining questions of arbitrability when the seat of arbitration is in Switzerland.

170. The Arbitral Tribunal in ICC Award 4589/1984 held that the parties by agreeing to have their dispute settled under the Rules of the ICC Court of Arbitration were to be considered as having adhered to Art.12 of said Rules which gave the Court of Arbitration the power to fix the place of arbitration when it was not agreed upon by the parties.

other than the one that promulgated the law in question (if enforcement were sought in any other country) would not necessarily have any regard to another country's public policy concerns.¹⁷² Fortunately, the enforcement of an arbitral award which falls under the New York Convention has rarely been refused for reasons of public policy.¹⁷³

It seems that limits of public policy are accredited to arbitral practice. Even where the parties have empowered the arbitrator to act as an *amiable compositeur*¹⁷⁴, the arbitrator is not authorised to take a decision contrary to an absolutely constraining law, particularly the rules concerning public order or morality.¹⁷⁵ Out of concern for the integrity and efficacy of the international arbitral process, and for the eventual enforcement of the ultimate awards, international arbitrators generally recognise today that mandatory provisions of law that are foreign to the *lex contractus* should be applied in an international arbitration in appropriate circumstances.¹⁷⁶ If an arbitrator is

171. Even if there is an arbitral award by truly international arbitral tribunal such as Iran- US Claims Tribunal, the award is not directly enforceable under international obligations, but is through the defence to the enforcement of foreign arbitral awards provided for in the New York Convention.

172. It was observed in ICC Award 4695/1984 that if a tribunal would decline to exercise jurisdiction on the basis of the possible difficulties of a future enforcement in a given country, then there would be no award at all, susceptible of being enforced in other jurisdictions.

173. Sanders, 'A Twenty Years' Review of the convention on the Recognition and Enforcement of Foreign Arbitral Awards,' (1979) 13 Int.Law.269; Note, 'The Public Policy Exception to Enforcement of International Arbitral Awards : Implications for Post-NAFTA Jurisprudence,' 30 Tex.Int'l L.J. 205(1995), p.208.

174. Art.28(3) of the Model Law, Art.1054(3) of the Dutch Act, Art.187(2) of the Swiss PIL, Art.33(2) of UNCITRAL Rules. ICC Awards 3267/1984, 4567/1985.

175. ICC Award 1677/1975, 3 YCA 217(1978); Arts.13.4 or 26 of the ICC Rules. Park, 'National Legal Systems and Private Dispute Resolution,' (1988) 82 AJIL 616. It was accepted in an ICC Award 5277/1987 that a court in a Moslem country would not uphold a claim for interest even though it was to be dressed up in such a way as might be described as a claim for damages for loss.

176. ICC Final Award in case no. 5622 of 1988, in YCA (1994) 105, ICC Final Award 6752/1991, in YCA (1993); ICC Preliminary Arbitral Award 4132/1983 in Jarvin and Derains, *Collection of ICC Arbitral Awards 1974-1985*(1990), 10 YCA (1985) pp.49-52; The primacy of the interest of the parties and the common efforts of all legislatures are involved in the legislative competition for international arbitration to maximize the economic efficiency of international

empowered to apply mandatory law such as competition law, he also has the duty to do so whenever he considers the provisions in question to be applicable, whether at the request of one of the parties or *ex officio*.¹⁷⁷

III. Legality and Efficacy

A. Generally

The question may not be easy to answer whether the parties are more interested in a rapid and definitive decision, with a risk of error, or in much longer proceedings in which certain risks of error are eliminated. While parties who submit their disputes to arbitration expect the proceedings to be private, inexpensive, expeditious and final, at the same time, the parties may expect any ensuing award to be appropriate in light of the facts and legal issues presented by the underlying dispute. The answer should depend ultimately on the contractual intention to be found in a particular arbitration agreement giving rise to the award in question. The suggestion that it is conceptually impermissible for the courts to review issues decided to be arbitrable fulfils the contractual expectations of the users of international commercial arbitration and, by preserving the features which make arbitration an attractive alternative to litigation, serves to advance the emphatic policy in favour of arbitral dispute resolution which applies with special force in the field of international commerce.¹⁷⁸ One of the most important endorsements of finality can be the arbitration agreement itself which is the document which provides evidence of the parties' intention in selecting arbitration as the means of resolution of disputes. It may well be that in commercial and investment disputes involving parties of different nationalities, the ultimate role of the national

economic arbitration. See, Tebbens, *op.cit.*, p.143.

177. Hochstranger, *op.cit.*, p.76.

178. The *Mitsubishi* case, 473 US 6144.

courts will be to compel use of the arbitral tribunal as adjudicating authority and to accept the role of 'executioner' of arbitral awards.¹⁷⁹

B. Limited Defence under New York Convention

1. Grounds of Refusal

Actors in international business transactions look to the New York Convention of 1958 to provide a reasonable expectation that arbitration commitments will be more than mere pieces of paper.¹⁸⁰ The Convention does not permit a court of a contracting state to review an award on its merits. Pursuant to the spirit of the Convention, the essence of the law of arbitration in individual contracting countries is limited judicial review of arbitral awards.¹⁸¹ Most arbitration laws and practice in developed countries try to find an equipoise of compromise between these international obligations and their national requirements.¹⁸²

The limited defence in the Convention includes five procedural defects in the integrity of the arbitral process: lack of a valid arbitration agreement; denial of an opportunity to be heard; an excess of jurisdiction by an arbitrator in deciding matters beyond the scope of the arbitration subject; procedure contrary to the parties' agreement; and annulment of the award in the country where rendered. For the

179. The concept of "internal connection" -Binnenbeziehung- bars attachment of foreign state assets in Switzerland in a dispute whose subject matter is unconnected to Switzerland, even when an arbitral award in the dispute is rendered within Swiss territory. This concept requires a showing of certain minimum contacts between the dispute and Switzerland before enforcement of a judgment or award against a foreign state. Note, 'Socialist People's Libyan Arab Jamahiriya v. Libyan Am.Oil Co.(LIAMCO),' 75 AJIL 153 (1981)

180. Park, 'When the Borrower and the Banker are At Odds:The Interaction of Judge and Arbitrator in Trans-Border Finance,'(1991) 65 Tul.L.Rev.1323, , p.1330.

181. de Vri, 'International Commercial Arbitration: A Contractual Substitute for National Courts,'(1982) 57 Tul.L.Rev. 42, p.52.

182. Mayer, 'Seeking the Middle Ground of Court Control: A Reply to I.N.Duncan Wallace,' (1991) Arb.Int. 311, p.313.

purposes of the Convention the decisive consideration is the location of the seat of arbitration, and awards rendered in a contracting state are capable of recognition regardless of the domestic or international character of the rules governing the proceedings. In a sense, it is a truism worth repeating that by arbitrating rather than litigating a dispute, parties to arbitration choose to bypass the court system altogether.

2. Burden of Proof

Art.V(1) of the New York Convention contains defences that may only be raised by the party opposing enforcement. For example, the due process defence in Art.V(1)(b) could only be brought up at the insistence of the respondent. The court has no grounds to raise a due process defence on its own under Art.V(1)(b). Thus, when a party to an arbitration tries to enforce the award in favour of him, the unsuccessful party in the arbitration may be successful in seeking to challenge the award for the reasons that the award has been obtained in violation of the principles of due process.¹⁸³ Upon procedural matters, the Convention provides in Art.V(1)(d) that a defence may be made against the enforcement of an award if the arbitral procedure was not in accord with the parties' choice or, without such choice, violated the national arbitration law of the arbitral seat. Pursuant to Art.V(1)(a), it is suggested that the standards for the due process might be determined by the law selected by the parties or the law of the place of arbitration.

Under Art. V(1)(b) of the Convention, it is required that the parties be given proper notice of arbitration proceedings to present their cases. It is understood that the due process defence under Art.V(1)(b) of the New York Convention was not intended to include inadequate opportunity to present defence, but the primary elements of due process are notice of the proceedings and an opportunity to be heard.¹⁸⁴

183. G.W.L.Kersten & Co. B.V. (Neth.) v. Société Commerciale Raoul-Duval et Cie (France), Gerechthof [Court of Appeal] Amsterdam, 16 July 1992, YCA (1994) 708.

184. Biotronk Mess - und Therapiegeräte GmbH & Co. v. Medford Medical Instrument Co., 415

Where the unsuccessful party was given notice of every step of the arbitration process and granted repeated extensions of time and given every opportunity to participate in the arbitration, the fact that participation in a foreign arbitration would be inconvenient for the party does not amount to a denial of the party's due process rights. Furthermore, by agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights in favour of arbitration "with all of its well known advantages and drawbacks."¹⁸⁵ If the party did not wish to have its business disputes adjudicated in arbitration proceedings, it should have negotiated more favourable terms at the very start.¹⁸⁶ The provisions of Art.V(1)(b) of the Convention, therefore, are interpreted narrowly as an exception to refuse to enforce an arbitral award.¹⁸⁷

When an arbitration has proceeded in a convenient place under the procedural law agreed, but in a way restricted by the law of the place of arbitration, the defence may be made at the stage of recognition and enforcement of the arbitral award. In such circumstances, the enforcing forum, following the limited defence of due process, should enforce the arbitral award even if the only due process standards satisfied are those of the governing law chosen by the parties in their contract or determined to be applicable by the arbitrators.¹⁸⁸ If the due process principles of the system of laws which govern the tribunal's decision are satisfied, the enforcing forum ought not to insist on applying its own standard to due process requirements.¹⁸⁹

F.Supp 133 (DNJ 1976)

185. *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)* 508 F.2d. 969 (2d Cir.1974), at 975.

186. *Geotech Lizenz AG (Switz) v. Evergreen Systems, Inc.(US)*, 697 F.Supp. pp.1248-1258(1988), USDC, Eastern District of New York, 27 and 28 Oct. 1988, in YCA (1990) 561

187. Comments, 'Iran Aircraft Industries v Avco Corporation : Was a Violation of Due Process Due?' (1994) 20 Brooklyn J.Int.L. 443

188. Trooboff & Goldstein, 'Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in the US Courts,' (1977)17 Va.J.Int.L.469, p.473.

189. The *Dalmia Dairy* case, [1978]2 L.I.R. 223, p.269.

If the aggrieved party was denied the opportunity to be heard in a meaningful time or in a meaningful manner, however, enforcement of the award should be refused pursuant to Art.V(1)(b).¹⁹⁰ Where the aggrieved party is found to have been misled at pre-hearing conference by the arbitral tribunal, the party is “unable to present [its] case” within the meaning of Art.V(1)(b), and enforcement of the award is to be refused on the ground that the tribunal denied the party the opportunity to present its claim in a meaningful manner.¹⁹¹

3. Public Policy Defence

Public policy questions, although they are of the nature of substance, involve the procedural law of arbitration. In practice, a breach of the rules of natural justice of either the *situs* state, or the forum where the arbitration award is to be enforced, will result in a refusal to enforce the award on the grounds that it violates the domestic public policy of the forum state under Art.V(2)(b) of the New York Convention, Arts.34 and 36 of the Model Law.¹⁹² Consequently, even should the respondent not bring grounds of refusal of recognition and enforcement provided for in Art.V(1) of the Convention, the court may do so under Art.V(2)(b). For instance, a violation of due process may fall either under Art.V(1)(b) or Art.V(2)(b). In the circumstances, the public policy defence under Art.V(2)(b) has been held to be simply a due process defence to the extent that it is quite limited in nature.¹⁹³

190. Mathews v. Eldridge, 424 US 319, 333, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18(1976)

191. Iran Aircraft Industries v. Avco Corp., 980 F.2d.141 (2nd Cir. 1992)

192. Paklito Investment Ltd v. Klockner East Asia Ltd., Hong Kong : Supreme Court of Hong Kong, High Court, 15 Jan.1993 No MP 2219, YCA (1994) 664.

193. K.S. AG v. CC SA, Camera di Esecuzione e Fallimenti [Execution and Bankruptcy Chamber], Canton Tessin, 19 June 1990, YCA XX(1995) Switzerland no. 23. It was held in the case that a procedural defect, with the obvious exception of the violation of fundamental principles of Swiss legal system, in the course of the foreign arbitration did not lead necessarily to refusing enforcement even if the same defect would have resulted in the annulment of a Swiss award. The award in the case did not contain any indication as to the seat of the arbitration and the place of rendition of the award. Furthermore, the award was signed by only the majority of the

All in all, the country where enforcement of an arbitral award is sought may deem the arbitral process to have given rise to binding and enforceable obligations irrespective of the status of the award in the eyes of the country where the award was rendered.¹⁹⁴

C. National Trends on Limited Judicial Review

1. Exclusion Agreement

a. Speedy Finality

The major objectives in choosing arbitration, as the means of dispute settlement - lower costs and speedier resolution - can be achieved with certainty only if the arbitral award is final.¹⁹⁵ If the arbitrator's decision is subject to judicial review on the merits, the original choice of arbitration can be meaningless. The possibility of a right of appeal from the arbitrator to the court is to that extent a negation of the primary purpose, indeed the aims of arbitration.

Frequently, each party does not trust in the other's national legal institutions and both may suspect that recourse to strictly legal remedies, whether foreign or national in character, is an inappropriate way to resolve their differences.¹⁹⁶ Since the modern trend is to respect the intention of the parties to refer their disputes to arbitration rather than the court and to replace legal accuracy with the 'speedy finality' of arbitration, an appeal procedure from the arbitral tribunals to the ordinary courts is subordinated to an

arbitral tribunal.

194. The *Dalmia Dairy* case, [1978]2 Ll.R. 223 ; Paulsson, 'The Role of Swedish Courts in Transnational Commercial Arbitration,' (1981) 21 Va.J.Int.L.211, p.242.

195. Chapman, 'Judicial Scrutiny of Domestic Commercial Arbitral Awards,' (1995) 74 Can.Bar.Rev. 3, 401.

196. Carbonneau, 'The Elaboration of a French Court Doctrine on International Commercial Arbitration : A Study in Liberal Civilian Judicial Creativity,' (1980) 55 Tul.L.Rev.1

exclusion agreement so that it can be, and often is, abrogated by agreement of the parties.

The party with the stronger bargaining position, however, may have an ulterior motive for excluding the right of recourse against the award which does not apply to the other party. This locks a party who may never have agreed to arbitrate into costly proceedings.¹⁹⁷ In such a case, the weaker side in the arrangement may be put in a widely unsatisfactory position whose cost cannot be accurately computed as against the value of the contract.

There may be a situation where a participant may wish to avoid the publicity or expense of a court action at all costs and be prepared to settle for the arbitrator's decision in any event. In fact, unless a party has seen the award, it can rarely know whether to exclude the possibility of bringing setting aside proceedings.

There is a never-ending war between two irreconcilable principles, the high principle which demands justice though the heavens fall, and the principle which demands that there shall be an end to litigation.

One of the major concerns of most revisions of national arbitration laws is the issue to what extent means of recourse to set aside an arbitral award should be permitted. Normally, in the vast majority of states, the courts characterize a foreign award as conclusive on the merits, thus limiting review to questions of personal and subject matter jurisdiction, fraud, and public policy.¹⁹⁸

b. Absolute Exclusion

Belgium has gone all the way in eliminating any kind of judicial control over

197. Similar result happens where challenges to the arbitrator's jurisdiction can only be brought under Art.1679(3) of the Belgian Code Judiciaire after the rendition of the final award on the merits.

198. Comment, 'Foreign Judgments Based on Foreign Arbitral Awards : The Applicability of *Res Judicata*,' (1975)124 U.Pa.L.Rev.223, p.231.

arbitral awards rendered in Belgium when none of the parties is connected with that country.¹⁹⁹ From its adoption in 1985, this particular feature of Belgian law has been the object of controversy.

Although the law was clearly intended to improve the attractiveness of Belgium as a *situs* for international arbitration, it was feared that it might have the opposite effect.²⁰⁰ Depriving the parties of any safeguard against arbitrary awards might deter the parties from arbitrating in Belgium and possibly also have an adverse effect upon the recognition of awards in other countries. These fears may have proved unfounded and the removal of control over awards rendered between foreigners may have had the positive effect that was intended by the promoters of the new Belgian system.²⁰¹

c. Express or Implied Exclusion

A very large number of international contracts incorporate ICC arbitration clauses, i.e. provisions to the effect that any dispute will be submitted to arbitration in accordance with the Arbitration Rules of the ICC. In accordance with Art.24 of the ICC Rules, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal in so far as such a waiver can validly be made.

199. In 1985, Belgium stunned much of the arbitration world by adding to Art.1717 of the Code Judiciaire a para.(4) which limits the bringing of setting aside proceedings to cases where one of the parties to the dispute dealt with in the arbitral award is either an actual person, who is a Belgian national or is resident in Belgium, or a legal entity incorporated in Belgium which has a branch or place of business there. Storme, 'Belgium: A Paradise for International Commercial Arbitration,' (1986) 14 IBL 294. Similarly Art.34(1) of the Malaysian Arbitration Act as amended in 1980 provides that the law does not apply to arbitrations held under the auspices of the Kuala Lumpur Arbitration Centre, thus excluding any recourse to the courts during the arbitration or in the post award stage. Lim, 'The Kuala Lumpur Regional Arbitration Centre,' (1988) 3 ICSID Rev.-FILJ 18.

200. Samuel, 'Arbitration in Western Europe - A Generation of Reform,' (1991) Arb.Int. 319, p.342.

201. Delaume, 'Reflections on the Effectiveness of International Arbitral Awards,' (1995) 12 J.Int.Arb. 5, p.12.

Under the new Swiss Private International Law of 1987, an agreement to submit a dispute to ICC arbitration, which by that organization's rules is deemed to be a waiver of all rights of appeal capable of being excluded in that way, does not suffice to eliminate the right to bring setting aside proceedings in Switzerland. The agreement should contain an express declaration that the parties renounce any and all judicial review of the arbitrator's decision. The new Swiss law follows in that respect the Belgian example and sets new standards in, at the same time, respecting the parties autonomy.²⁰²

Under English law, however, parties to contracts containing ICC arbitration clauses need not decide whether or not to enter into a further express exclusion agreement, since in reality they already have done so (whether they appreciated it or not) when they agreed to subject themselves to the ICC Rules. Under English law, Art.24(2) of the ICC Rules is considered an effective exclusion agreement.²⁰³

The most significant reform introduced by the 1979 Act into English arbitration law is to permit parties to an arbitration agreement to enter into what is labelled in the statute an 'exclusion agreement' where it is their desire to contract out of the rights to judicial review established under the Act.²⁰⁴ The Act attempts to do this by making contracting out of judicial review easily available and thereby catering to the demands of those involved in international arbitration agreements that their arbitrations be final as to all questions of fact and law. Nevertheless, the phrase 'international arbitration agreement' does not appear in any English Arbitration Acts.

It is, however, a convenient label to apply to the residuary category of arbitration agreements which are neither 'domestic'²⁰⁵ nor which relate to 'special

202. Wehrli, 'New Swiss Law on International Arbitration,' (1989) 17 IBL 165

203. *Marine Contractors Inc. v. Shell Petroleum Development Co of Nigeria Ltd.* [1984]2 Lloyd's Rep. 77; *Bank Mellat v. GAA Development* [1988]2 Lloyd's Rep. 45

204. For the details, see, Thomas, *Appeals from Arbitration Awards*(1994), p.419.

205. A domestic arbitration agreement is defined by s.3(7) of the Arbitration Act 1979. The adopted

category disputes'.²⁰⁶ An exclusion agreement relating to a non-domestic arbitration agreement outside the special categories is fully effective to exclude the 1979 Act's new judicial review procedures and its provision for determination by the court of a preliminary point of law.

2. Limited Grounds of Judicial Review in France

Prior to 1981, the growth in the number of international arbitrations held in France had led French courts to an increasing concern for balance between the arbitral autonomy necessary for effective commercial arbitration on the one hand, and the need to ensure the integrity of arbitral awards rendered in France on the other.²⁰⁷ Before the Decree of May 12, 1981, under French law appeal from an award could be lodged only in regard to French, as opposed to non-French, awards. Where an award was not rendered under French procedural rules, the fact that the proceedings had taken place in France was not sufficiently characteristic to treat the awards as French. Thus, the award which was rendered in France, but pursuant to institutional arbitration rules such as the ICC Rules was deemed to be a 'foreign' award not subject to appellate review.²⁰⁸

formulation follows closely the definition of a domestic arbitration agreement in the Arbitration Act 1975, s.1(4). Under the 1979 Act the moment when the nationality, residence or other attribute of the parties is to be determined is "at the time when the arbitration agreement is entered into." For the purposes of the 1975 Act the critical moment is "the time the proceedings are commenced."

206. According to section 4 of the English Arbitration Act of 1979, shipping, insurance, and commodity contracts fall within the special category. The creation of these special categories under section 4(3) of the 1979 Act was controversial at the time both outwith and without Parliament, because the provision could have a contra-productive effect. For instance, some of the standard shipping contracts were expressly made subject to the law of Bermuda or Hong Kong: this would effectively be the same as English law, but would permit exclusion agreements and thereby circumvent the appeal procedure. This was called as "Bermuda hole." See, Kerr, 'The Arbitration Act 1979,' (1980) 43 MLR 45, p.57; Note, 'The 'Special Categories' under the English Arbitration Act 1979 - Memorandum from the Departmental Advisory Committee on Arbitration,' (1993) 9 Arb.Int. 405, p.409.
207. Craig, *et.al.*, 'French Codification of a Legal Framework for International Commercial Arbitration : The Decree of May 12, 1981,' (1981) 13 L.& Pol'y Int.Bus.727, p.729.
208. General National Maritime Transport Co. v. Societe Gotaverken Arendal AB, (1981) 20 ILM

By treating international arbitration under international rules sitting in France as foreign, the courts tried not only to isolate the litigation relating to international commercial arbitration from the potentially restrictive domestic law, but they tried also to create a singularly liberal body of doctrine which minimizes other possible legal obstacles to the process of international commercial arbitration.²⁰⁹

The 1981 Decree reaffirms the distinction between the domestic arbitration and the international arbitration and makes it clear that the promulgation of the 1980 Decree reforming domestic arbitration does not mean that all of the criteria set forth therein are to be applied to international awards. An important distinction between domestic and international arbitration revealed by the 1981 Decree is that, although awards of both types may be rejected on grounds of public policy (*ordre public*), international awards may be challenged only if there is shown to be a violation of international, as opposed to internal, public policy.²¹⁰

The 1981 Decree achieves this situation by providing that under Art.1502 of the Code of Civil Procedure (as amended by the Decree), the French courts can entertain an

884; Cociete AKSA, SA v. Societe Norsolar, SA, (1981) 20 ILM 887; Similar difficulty also happens where a court is seised of deciding whether to hear setting aside and other application relating to an arbitration where the parties were both foreign. See, Pabalk v. Norsolar, (1982) YCA 312,(1983)YCA 362,(1984) YCA 154, 24 ILM 360 (1985). Against these decisions, commentators argued that a completely laissez faire approach symbolized by the *Gotaverken* and *AKSA* decisions might impede the efficient operation of international arbitration. They based their reasons on the ground that national courts abroad, when faced with a request to enforce an award rendered in France, might less readily grant enforcement if it appeared that international arbitration in France was conducted with little or no judicial control. It was argued that it was in the interest of both fairness to the losing party and the efficient administration of transnational justice to enable a party having lost a defective arbitration to have the award set aside once and for all in the state where it was rendered, rather than be obliged to resist the award in each and every jurisdiction where the winning party might subsequently seek enforcement.

209. Carbonneau, *op.cit.*, p.15; Paulsson, 'Lex Mercatoria as Governing Law in Arbitration,' (1990) 18 IBL 4.

210. The demands of international public policy are fewer than those of domestic public policy, the rationale being that the French courts should intervene less frequently when international, as opposed to purely French, interests are involved.

appeal against non-French awards when it is argued, on the limited grounds set forth in that provision, that the award is void; and that Art.1492 of the revised Code of Civil Procedure provides a new definition of 'international' awards which is generally described as 'economic criteria'.²¹¹

Since under the 1981 Decree, French courts have a clearly defined role in the review of international arbitrations taking place in France, such awards cannot be considered 'floating' or 'outside the law', an argument that has been used to resist enforcement abroad.²¹² While an international arbitral award rendered in France and set aside in the French courts would almost certainly be rendered unenforceable throughout the world²¹³, an unsuccessful respondent in an arbitration outside France has to invoke setting aside procedure to convince the French courts that one of their grounds for annulling the award exists in his case if he has significant assets in France.²¹⁴ One result of all this is that a party that may be subject to enforcement proceedings in France would be best advised to arbitrate there.²¹⁵

211. Even under the revision, however, the international arbitration provisions of the French Code of Civil Procedure do not create a set of rules notably distinct from those governing domestic arbitration. Pursuant to Art.1495 of the French Code of Civil Procedure, the provisions for the domestic arbitration still applies to international arbitrations governed by French law unless excluded by the parties with the exception of the provisions relating to setting aside proceedings. In this sense, there is no separate international arbitration law in France. Art.1504 of the French Code of Civil Procedure provides that the action to set aside under Art.1502 encompasses *ipso jure* appeal against the decision of the enforcement judge having issued such an order, or having declined jurisdiction. Thus, the grounds of setting aside an international arbitral award rendered in France apply alike to the enforcement procedure of arbitral award rendered abroad.

212. On the one hand, the Decree provides that international arbitral awards rendered in France may indeed be set aside by French courts. Thus, the possibility of judicial control at the place of arbitration will always exist, thereby dissipating whatever doubts may have been raised by the *Gotaverken* and *AKSA* cases. On the other hand, the Decree carefully limits the grounds on which arbitral awards may be set aside.

213. New York Convention Art.V(1)(e)

214. *Hilmarton Ltd. (UK) v. Omnium de traitement et de valorisation - OTV (France)*, Tribunal de Grande Instance [Court of First Instance], Nanterre, 22 Sept. 1993, Cour de Cassation [Supreme Court] 23 March 1994, YCA XX(1995).

3. German Principles

Similar to French legislation prior to the 1981 Decree, a major deficiency of the German law relates to the so-called 'procedural theory' advocated by the German courts according to which an arbitration is foreign if the arbitrators have applied a foreign arbitration law irrespective of the situs of the arbitration.²¹⁶ Traditionally, West German courts have taken the view that German judicial review of arbitral awards extends to and only to awards rendered under West German procedural law since they are considered domestic.²¹⁷ This approach conflicts with the 'territorial principle' as the underlying basis of most modern arbitration laws, i.e. that the arbitration law of the situs applies to all arbitrations taking place on the soil of the respective country.

According to German law, stipulations in standard arbitration rules such as Art.24(2) of ICC Arbitration Rules relate only to internal appeal procedures to second instance arbitral tribunal, but do not affect a party's right to apply to the court in an action to have the award set aside. This can only be excluded by an agreement of the parties concluded after the award has been made and when the list of grounds of setting aside in the German Code of Civil Procedure is known to them. Only the right to have the award set aside for lack of reasons can, therefore, be excluded in advance by agreement of the parties.²¹⁸

215. Samuel, *op.cit.*, p.339.

216. Berger, *op.cit.*, p.90.

217. Glossner, *Commercial Arbitration in the Federal Republic of Germany*, (1984. Kluwer) p.27.

218. Section 1041 (5) of German Code of Civil Procedure (ZPO) reads in relevant part as follows: "Actions to set aside the award may be brought: ... (5) if the grounds for the award are not stated; An award shall not be set aside on the grounds given in No.5, if the parties have agreed otherwise."

D. Efficacy and Court Assistance

If an arbitration is administered by well-known arbitration institutions and it is conducted by the well-drafted UNCITRAL procedural rules or the Model Law, that may be helpful to achieve speedy resolution, confidentiality of proceedings, availability of technical experts to decide the merits of the dispute, and freedom from possible national prejudice. In order to ensure the satisfactory outcome of an arbitral proceeding, however, more thoughts need to be given to the choice of the court in case of misplaced arbitration; and the familiarity of the procedural law of the court of the arbitration; and the existence of different procedural law of the court from the governing law of the contract.²¹⁹

Because arbitrators generally lack coercive powers, it will sometimes be necessary to seek the aid of the courts in such matters as compelling a reluctant party to arbitrate, in facilitating the gathering of evidence or in enforcing an award.²²⁰ In reality, international commercial arbitration cannot function effectively without the assistance of national courts and through the enforcement mechanisms of individual countries, and the choice of place or *situs* of arbitration plays a vital and far-reaching role.

The system of remedies represents the basic essence of civil procedure as defence in favour of the bearer of the infringed right and as sanction against the offender. This system includes also two other important kinds of remedies : the enforcement of claims and the provisional remedies (interim protective measures). The enforcement remedy realises coercively the claim (monetary or non-monetary) of the

219. Kerr, 'International Arbitration v. Litigation,' (1980) JBL 164, p.177.

220. The powers of the courts in relation to international arbitration could be categorised as powers of assistance in getting its process under way, powers of intervention in it while it is going on, powers of supervision or control in giving or declining to give effect to its outcome, and powers of recognition and enforcement. Kerr, 'Arbitration and the Courts : The UNCITRAL Model Law,' (1985) 34 ICLQ 1, p.2.

creditor against the defaulting debtor by giving to the creditor what the debtor has failed to perform voluntarily.²²¹ The necessary powers to give binding effect to the legal consequences of arbitration, which is the whole aim of the arbitral process, is invariably vested in the national courts by legislation.²²²

When a party to an international arbitration is in need of interim relief - such as injunction of proceedings pending in another jurisdiction, a conservatory attachment, or a discovery order - it may consider requesting provisional measures from the arbitral tribunal, municipal courts, or both. The object of the interim or interlocutory injunction is to prevent the increase of irreparable injury through unlawful interference with a person's rights pending the final determination of a dispute.

The interim remedy theoretically preserves the *status quo* until the matter is resolved in a forum which allows maximum access to relevant evidence and the representation of full submissions. In the majority of cases the need for an injunction does not arise. Nonetheless, the injunctive remedy does retain an importance for it is by far the most effective remedy by which an alleged 'defective' arbitration proceeding may be restrained at an early stage and held in abeyance until the issue has been resolved by the court : thereby precluding the continuance of an ineffectual and useless arbitral proceeding.²²³ The national court, however secure it may be in its knowledge of the well-settled rules for the granting of provisional measures in the context of ordinary municipal lawsuits, may find that the pendency of independent arbitral proceedings raises difficult questions of jurisdiction and comity.²²⁴

221. Stalev, 'The Effects of Judgments as Remedies,' (1989) CJC 329.

222. Kerr, 'Arbitration and the Courts : The UNCITRAL Model Law,' (1985) 34 ICLQ 1, p.15.

223. Thomas, 'The Injunctive Jurisdiction of the Commercial Court with regard to Consensual Commercial Arbitration,' (1981) LMCLQ 389, p.396.

224. McDonnell, 'The Availability of Provisional Relief in International Commercial Arbitration,' 22 Colum.J.Trans.L.273(1984), p.273, Friedland, 'Provisional Measures and ICSID Arbitration,' (1986) 4 Arb.Int.335.

CHAPTER THREE: ARBITRATION AGREEMENT AND RELEVANT COURT PROCEEDINGS

I. Enforcement of Arbitration Agreement

A. Substantive or Procedural Nature of Arbitration Agreement

Arbitration is traditionally used as a method of dispute resolution between private parties. Most contracts of affreightment include a clause providing that any dispute arising thereunder shall be referred to arbitration. This is invariably the case in relation to charter parties, though arbitration clauses are less frequently found in bills of lading except where the bill incorporates an arbitration clause in the charter party under which it is issued.¹ Insurance, commodity, and construction businesses also follow the tradition.

The agreement to arbitrate has the effect of either 'conferring' jurisdiction on the arbitrator chosen by the parties to the agreement, or 'staying' or in effect 'ousting' jurisdiction of the court. From the nature of arbitration, the former effect of the agreement to arbitrate is not opposed by the court. Less favour is, however, to be given to the latter effect.²

The development of arbitration shows that there used to be a scepticism about

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1. Wilson, *Carriage of Goods by Sea* (1993) p.321; The English Court demands a strict test for the question whether an arbitration clause, the text of which is set out in a charter-party, have been effectively incorporated by reference into bills of lading issued under the charter-party, since a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charter-party. See, *The "Federal Bulker"*, [1989]1 Lloyd's Rep. 103.
 2. Perillo, Jr., 'Selected Forum Agreements in Western Europe,' (1964) 13 AJCL 162, p.164; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395, 403-04, 87 S Ct 1801, 18 L Ed 2d 1270 (1967); *Nesslage v. York Securities, Inc.*, 823 F.2d.231, 232, 235 (8th Cir. 1987); *Daisy Mfg.Co., Inc. v. NCR Corp.*, 29 F.3d. 389 (8th Cir. 1994)

the acceptance of arbitration agreements.³ For instance, an arbitration clause is one example of a clause excluding a local court by selecting a forum resolving disputes. Forum-selection clauses have historically not been favoured by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were “contrary to public policy” or that their effect was to “oust the jurisdiction” of the court.⁴

It is normal that the principles of choice of law apply in international arbitration⁵ : the arbitral tribunal must determine the applicable law by reference to appropriate conflict of laws rules, and then apply the law to which the conflict of laws rules refer it.⁶ Procedural rights different from the primary rights of the contract may be available in the law of the forum, *lex fori*. It is sometimes called a ‘secondary right’ or a ‘remedial right’ which is created as the ‘remedy’ for ‘breach’ of the ‘primary right.’⁷

According to divergent municipal laws, or under the parallel existence of federal and state legal systems in federal states, there may be various and even conflicting legal principles on the nature of right of arbitration. For the purposes of international arbitration, arbitration may be treated similarly to other provisions of the contracts as substantive. As a result, the courts in a particular state may not be free to strike down arbitration agreements which are enforceable in other country or state under federal legal principles for reasons that arbitration agreements were to be considered only as

3. Hamlyn & Co. v. Talisker Distillery, (1894) 21 R (HL) 21. The main dispute in the case was whether unnamed arbitration clause was valid before the Courts in Scotland when there was to be arbitration in London under English law. Thomas, ‘Scott v. Avery Agreements,’ [1991] LMCLQ 508, p.517.

4. M/S Bremen v. Zapata Off-Shore Co., 407 US 1, S Ct 1907, 32 LEd 2d 513, p.520.

5. According to Art.1492 French NCCP, “The arbitration is international if it involves the interests of international trade.”

6. Smit, ‘Substance and Procedure in International Arbitration:The Development of a New Legal Order,’(1991) Tul.L.Rev.1309, p.1310.

7. Cook, ‘ ‘Substance’ and ‘Procedure’ in the Conflict of Laws,’ (1933) 42 Yale L.J. 333, p.349.

possessing certain procedural aspects.

Before the principles of arbitration had developed up to the current stage, at common law, executory agreements to arbitrate all future disputes that might arise out of the contract were revocable until the announcement of the award. Thus, one party to a contract could agree to arbitrate future controversies but would still be free to revoke the agreement prior to rendition of the award and to institute court action on the dispute.

This revocability doctrine, first established in England, was based upon the common law dislike for any method of settlement which would “oust the jurisdiction of the courts.”⁸ Although there is no longer such distaste towards arbitration agreements, there are still arguments about the extent to which an arbitration agreement has the effect of divesting the court of ordinary power with regard to arbitral proceedings.⁹

If an arbitration agreement is characterised only as procedural, executory agreements to arbitrate all future disputes that might arise out of the contract would be revocable under a procedural law hostile to arbitration until the award is announced on the basis that such methods of settlement would “oust the jurisdiction of the courts.”¹⁰

The characterisation of the nature of right of arbitration as procedural or substantive is important in deciding whether the right of arbitration is to be treated differently from the right of the contract to which it is closely related.

B. Federal Policy Favouring Arbitration in the United States

It has long been discussed in the United States of America whether statutes which make arbitration agreements enforceable will be treated as procedural or not. With regard to the construction of section 2 of the Federal Arbitration Act (FAA)¹¹, it

8. *Scott v. Avery* (1856) 5 HL Cas.811, 10 Eng Rep 1121

9. Comment, ‘Injunctions Pending Arbitration and the Federal Arbitration Act : A Perspective from Contract Law,’ (1987) 54 U.Chi.L.Rev. 1373

10. Notes, ‘Delimitation of ‘Procedure’ in the Conflict of Laws,’ (1933) 47 Harv.L.Rev.315, p.318.

11. Section 2 of the United States Federal Arbitration Act provides as follows :

was, on the one hand, viewed that section 2 enacted federal ‘substantive’ law, while, on the other, the legislative history showed that an arbitration agreement was to be enforced as a ‘procedural’ question, by analysis of the section’s terms and their derivation.¹²

The main reason for the latter view was that the enforcement provisions of the Federal Arbitration Act would automatically be characterised as ‘procedural’, to be governed by the law of the forum.¹³ From the former view of the nature of section 2 of the FAA which mandates enforcement of arbitration agreements, the section prevails over any relevant state law, and thus preempts a particular state law, for instance, section 229 of the California Labour Code, which provides that actions for collection of wages may be maintained “without regard to the existence of any private agreement to arbitrate.”

The U.S. Supreme Court held that section 2 was a Congressional declaration of a liberal federal policy favouring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary and the effect of the section was to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.¹⁴ The U.S. Supreme Court, however, when

“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

12. Note, ‘Erie, Bernhardt, and Section 2 of the US Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy,’ (1960)60 Yale LJ 845, p.853.
13. Kochery, ‘The Enforcement of Arbitration Agreements in the Federal Courts: Erie v. Tompkins,’ (1953) Cornell L.Q. 74, p.86.
14. Perry v. Thomas, 482 US 483, 107 SCt 2520, 96 LEd 2d 426, p.435. In Allied-Bruce Terminix Cos. v. Dobson, 513 U. S. ___, 130 L Ed 2d 753, 1153 S Ct 834(1995), upholding the enforceability of a predispute arbitration agreement governed by Alabama law, even though an Alabama statute provides that arbitration agreements are unenforceable, the court observed that United States Congress passed its Federal Arbitration Act to overcome courts’ refusals to

faced with the question whether the Californian Arbitration Act containing a provision allowing a court to stay arbitration pending resolution of related litigation was to be applied to an arbitration falling within the Federal Arbitration Act, regarded the Californian law as the procedural law of the arbitration. Since the question had not dealt with the provisions of the FAA, the court decided that under the FAA, there was no strong public policy preventing the State law from applying to the case where the parties had agreed that their arbitration agreement would be governed by the law of California.¹⁵

In the United States, in principle, an arbitration clause is regarded as a forum selection clause found in a contract involving international commerce, and its validity, interpretation, and enforcement are governed by FAA. The US Supreme Court decisions point toward increased recognition of the federal policy favouring arbitration and away from suspicion of arbitration as a preferable forum for settling disputes.¹⁶

In order to negate an arbitration agreement, a party could attempt to make a

enforce agreements to arbitrate.

15. *Volt Information Sciences, Inc. v. Board of Trustees of the Leeland Stanford Junior University*, 489 US 468, p. 494, 103 LEd 2d 488, 109 S Ct 1248. Led by the Second Circuit court, however, lower courts construed the *Volt* decision as creating a rigid role of interpretation of applicable law clauses, regardless of the evidence presenting that the clause was not intended to incorporate the arbitration law of the state. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 US ___, 131 L Ed 2d 76, 115 S.Ct. 1212, an arbitration panel sitting in Chicago issued a punitive damages award in a securities fraud case under a brokerage agreement that included an applicable law clause specifying that New York law would govern the relationship of the parties. In *Mastrobuono*, the Supreme Court noted that had the parties expressly provided for punitive damages in their arbitration clause, the FAA would preempt the New York rule that arbitrators cannot award such damages, and that the choice-of-law provision covered the rights and duties of the parties, while the arbitration clause stipulated arbitration; neither sentence intruded upon the other. The *Mastrobuono* decision, therefore, confines *Volt* to the precise dimensions of that case.
16. *Scherk v Alberto-Culver Co.*, 417 US 506, 41 L Ed 2d 270, 94 S Ct 2449; *The Prima Paint*, 388 US 395 ;*Southerland Co. v. Keating*, 465 US 1, 12, 104 S.Ct. 852, 79 L.Ed. 2d.1 (1984); *Bremen v. Zapata*, 407 US 1; *Moses H.Cone Hospital v. Mercury Construction*, 460 US 1, 74 LEd 2d 765, 103 S Ct 927. These decisions are followed by the courts below. *Astor Chocolate Co.(US) v. Mikroverk Ltd.(Canada) and Mikroverk, YCA* (1990) 613, p.614; *Daisy v. NCR*, 29 F.3d. 389 (8th Cir. 1994)

showing that would justify setting aside a forum-selection clause such as that the agreement was affected by fraud, undue influence, or overweening bargaining power; that enforcement would be unreasonable and unjust; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court.¹⁷ Without such a showing, there is no basis for assuming the forum inadequate or its selection unfair.

In the *Mitsubishi* case,¹⁸ the court reversed the mistrust of arbitration that formed the basis for the *American Safety* case in 1968¹⁹ in the international context and it proceeded to enforce the arbitration agreement, basing itself on the ground that the mere appearance of an antitrust dispute did not warrant invalidation of the selected forum without a showing that the arbitration clause was tainted. As a result, the Supreme Court in the *Mitsubishi* case was able to compel the opposing parties to refer their disputes to arbitration in Japan.

In the United States, state laws do not apply to contracts made under the Convention, as it is intended to apply only to interstate commerce, not to foreign commerce. When state laws conflict with the Convention, the supremacy principle of the US Constitution mandates the application of the Convention, federal arbitration law, not statutory law of a given state which is in turn applicable to international commerce.²⁰ It is not, however, easy to decide whether and when the FAA applies. Under legal systems of federal states, it needs to be decided whether either federal law

17. *Bremen v. Zapata*, 407 US 1.

18. 473 US 6144

19. *American Safety Equipment Co. v. J.P. Maguire & Co.*, 391 F.2d. 821 (2d.Cir. 1968)

20. *Mcdermott International, Inc. v. Lloyds Underwriters of London*, John Richard Liverbrooke Yuell, United States District Court, Eastern District of Louisiana, 14 Feb. 1992, 944 F.2d.(5th Cir. 1991) pp.1199-1213, YCA (1993) 486; *Oil Transport Group (nationality not indicated) v. The West of England Ship Owners Mutual Insurance Association (Luxembourg)*, USDC, Eastern District of Louisiana, 14 Feb.1992, No.91-3645 Consolidated with 91-3798, 1992 U.S.Dist. LEXIS 1868, in YCA (1993) 511

or state law applies to the issue of the existence of an arbitration agreement. Where a request is made to compel arbitration, a crucial question may be raised whether the parties agreed to arbitrate the dispute and apply the federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of FAA. It may be contended that the *Mitsubishi* decision does not apply to a domestic transaction covered by local antitrust law which forecloses the intended arbitration. In a later case, it was decided that although the holding in the *Mitsubishi* case was limited to international transactions, this reasoning should apply with equal force in the domestic context.²¹

It was held in *Volt* that the federal policy favouring arbitration under FAA did not operate without regard to the wishes of the parties to the arbitration agreement.²² When the California Court of Appeal decided that the parties agreed to apply the California rules of arbitration rather than FAA's rules, the Supreme Court in *Volt* concluded that such an interpretation was entirely consistent with the federal policy to ensure the enforceability, according to their terms, of private agreements to arbitrate.

Based on this conclusion, the respondents in *Mastrobuono* contended that the parties to a contract might lawfully agree to limit the issues to arbitrate by waiving any claim for punitive damages. The court in *Mastrobuono* rejected the contention on the ground that the New York law chosen as a governing law of arbitration had nothing to do with procedural matters, or such state's allocation of power between courts and arbitrators, but to do with substantive matters.²³ It was held that the matter whether punitive damages would be allowed in arbitration sitting in Chicago, Illinois would not be dealt with by "the laws of the state of New York." While the federal policy favouring

21. GKB Caribe, Inc., doing business as Microage and Celluler One (US) v. Nokia-Mobira, Inc., and Cellular World, Inc.(U.S.), USDC, District of Puerto Rico, 17 Nov.1989, in YCA (1991) 635

22. The *Volt* case, 489 US 468

23. The *Mastrobuono* case, 131 L Ed 2d p.84.

arbitration or an interpretation upon the policy was not disturbed, the choice-of-law provision in an arbitration agreement was necessary to qualify as to the matters whether they are in nature substantive or procedural.

C. Mandatory Referral to Arbitration

It seems evident from the provisions of Art.II(3) of the 1958 Convention that the court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of that article, should refer the parties to arbitration.

In accordance with Art.5 of the Model Law, no court shall intervene except where the Model Law so provides.²⁴ The whole aim of the Model Law is to restrict to a minimum the part which the courts have to play when parties have agreed to an arbitration. If there is a valid agreement to arbitrate between the parties, the proper construction of Art.8(1) of the Model Law²⁵ is that a court should refer to arbitration a claim which has not been admitted by the party against whom it is made.²⁶ It would then be for the arbitrator to examine the merits on either side.²⁷ Mandatory injunctions

24. Under the Model Law, the role of the courts is mainly to support the arbitral process (referring parties to arbitration if a party to court proceedings pleads that the issue is subject to a valid arbitration agreement, granting interim measures of protection or assistance in taking evidence, appointing an arbitrator or arbitrators where appointment procedures have failed) and taking a more interventionist role only in very restricted circumstances (setting aside of arbitral awards, appeals against rulings of the arbitral tribunal on matters such as challenges to arbitrators and the tribunal's jurisdiction or lack of it, and deciding whether an arbitrator cannot act or has failed to act without undue delay). See, Davidson, 'International Commercial Arbitration in Scotland,' [1992] LMCLQ 376, pp.381-382.

25. The relevant part of Art.8(1) of the Model Law reads as follows : "(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

26. In *BWV Investments Ltd. v. Saskferco Products Inc.*, 119 DLR(4th) (1995) 577, the Canadian court rejected the contention that the arbitration agreement was null and void, inoperative or incapable of being performed because it was in conflict with Saskatchewan law where Art.8(1) of the Model Law was effective.

may be granted, on certain conditions, before arbitration begins, as “interim measures of protection” under Art.9 of the Model Law,²⁸ but it would be contrary to the spirit of the Model Law to take injunction proceedings in order to obtain, in advance, a court decision on substantive issues which are to be submitted to the arbitrators.²⁹

Both Art.8(1) of the Model Law and Art.II(3) of the New York Convention state that a court “shall” refer disputes to arbitration once a valid arbitration agreement is found to exist.³⁰ Unless the arbitration agreement is null, void, inoperative or incapable of being performed, a wide interpretation covering disputes other than one as to the very existence of the contract itself should be given to effectuate the parties’ presumed intention not to have two sets of proceedings.

II. Court Proceedings and Existence of Arbitration Agreement

A. Generally

The New York Convention does not provide for a self- sufficient system of

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27. Guandong Agriculture Company Ltd. v. Conagra International (Far East) Ltd., YCA (1993) 187, [1993] ADRLJ 100
 28. Katran Shipping Co.Ltd. (Hong Kong) v. Kenven Transportation Ltd (Hong Kong), Supreme Court of Hong Kong, High Court, 29 June 1992, YCA (1993) 175.
 29. Relais Nordik Inc. v Secunda Marine Services ltd. (1988) 24 F.T.R. 256 (Can.F.C.) commented in Tetley, ‘Canadian Arbitration Decisions 1986-1992,’ (1993) LMCLQ 238, p.240.
 30. In Canada, the federal government and most of the provinces have enacted legislation to incorporate the Model Law. In addition, Canada signed the New York Convention on May 12, 1986, and shortly thereafter, the federal government and all provinces enacted legislation implementing the terms of the Convention. In *BWV v. Saskferco*, 119 DLR(4th) (1995) 577, p.595, the court observed that for the policy considerations of the Model Law and the New York Convention, the court should grant a stay for the court proceedings based on the provincial statute applicable to the dispute. See also, *Nanisivik Mines Ltd. v. FCRS Shipping Ltd.*, [1994]2 FC 662 (Fed.C.A.), *Gulf Canada Resources Ltd/Resources Gulf Canada Limitée v. Arrochem international Ltd. and Arrochem International, Inc.*, Canada : British Columbia Court of Appeal, CLOUT Case 31, (1995) MAL Quarterly Reports 71, *Mind Star Toys Inc. v. Samsung Co. Ltd.*, Canada : Ontario Court, CLOUT Case 32, (1995) MAL Quarterly Reports 87.

settling disputes out of the reach of domestic law. It has only the limited purpose of facilitating on the international level the enforcement of arbitration agreements and awards. The Convention does not contain express provisions on provisional measures in aid of arbitration such as an injunction to enjoin demand of payment under a bank guarantee during an arbitration. The availability of and procedures relating to these measures depend on the law of the court before which such remedy is sought. Since the provisions of Art.II(3) require the court of a contracting state to 'refer'³¹ the parties to arbitration under certain circumstances, questions are naturally raised whether the request for interim measures of protection is compatible with the agreement between the parties to arbitrate. Under the New York Convention, one of the most complicated questions is raised as to the meaning of the word "refer" in Art.II(3) of the Convention.

B. United Kingdom

1. Section 1(1) of the 1975 Act³²

Where one of the parties to a contract raises an action before a court and there is an alleged agreement to arbitrate, the defendants in the action are most likely to request the court to order stay of proceedings in favour of arbitration while the plaintiffs seek to proceed with court action.³³

31. The word 'refer' in Art.II(3) is used for historical reasons. The UN Conference of 1958 that adopted Art. II(3) conveniently borrowed the word 'refer' from the Geneva Protocol of 1923 at the suggestion of the Netherlands delegation. See Becker, 'Attachments in Aid of International Arbitration - the American Position,' (1985) *Arb.Int.*40, p.45; van den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions,' (1989)1 *Arb.Int.*2, p.16.

32. The law is attempted to be stated as of July 1, 1996.

33. *Paul Smith v. H & S*, [1991]2 *Lloyd's Rep.* 127. ; *Rumt (Panama) S.A. and Belzetta Shipping Co. S.A. v. Islamic Republic of Iran Shipping Lines (The "Leage")*, [1984]2 *Lloyd's Rep.* 259.; *The "World Star"*, [1986]2 *Lloyd's Rep.*274; Similarly in Canada and in New Zealand, *Automatic Systems Inc. v. Bracknell Corp.* (1994) 113 *DLR* 449; *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994]3 *NZLR* 129.; *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.*, 167 *N.R.* 294 (F.C.A. 1994) commented in Wooder & Southcott, 'Canadian Maritime Law Update : 1994,' (1995) 26 *JMLC* 413.

In the UK, the question of the stay of legal proceedings brought in disregard of a non-domestic arbitration agreement is governed by section 1(1) of the Arbitration Act 1975 which gives effect to the 1958 Convention in the UK. The section is confined to arbitration agreements which are not domestic arbitration agreements.³⁴ In contrast to s.4(1) of the 1950 Act, a stay under s.1(1) of the 1975 Act is, subject to the specified exceptions, mandatory. Under the 1975 Act, a court is under an obligation to stay legal proceedings to which s.1 of the 1975 Act applies whether the proceeding is *in personam* or *in rem*.

Section 1 of the 1975 Act does not as a matter of law preclude the right to resolve by reference to the traditional courts of law a matter agreed to be referred to arbitration under a non-domestic arbitration agreement. Section 1 of the 1975 Act merely gives a party a right to apply for a stay. The operative words are that a party “may ... apply to the Court to stay the proceedings.” Where either party refused to arbitrate and brought a dispute before a court, the defendant in litigation, who wishes to arbitrate rather than to litigate, is firstly to seek a stay of the proceedings under the provisions of the Arbitration Act and secondly, simply to proceed with the arbitration, as he remains entitled and able to do so.

Section 1 of the 1975 Act does not adhere strictly to the terms of Art.II of the Convention. Section 1 of the 1975 Act provides for an additional circumstance when a stay shall be refused by a court. The section provides that a stay shall be refused when there is not in fact any dispute between the parties although the Convention is silent on the point.³⁵ For there to be a dispute there must exist a contention as to either liability

34. The section does not provide a direct definition of a non-domestic arbitration agreement. On the contrary s.1(4) provides a definition of a “domestic arbitration agreement” and so attempts to bring forth the concept of a non-domestic arbitration agreement as a residuary concept.

35. Unlike the English legislation, the 1984 Arbitration Act of New Zealand does not require the condition of *prima facie* existence of dispute in favour of arbitration for the stay of court proceedings in disregard of arbitration agreement. See, *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994]3 NZLR 129.

or the quantum of damage, or both.

The question of whether a legal proceeding should be stayed in respect of a matter agreed by the parties to be referred under an agreement depends on the construction of the agreement.³⁶ To find whether the contract between the parties contains a clause which provides an agreement to refer their disputes to arbitration, it is necessary to give the effect to the parties' intention that their disputes would be referred to arbitration.³⁷

If there is an agreement between the parties to refer their disputes to arbitration, the agreement is valid even where there is an optional *situs* for the place of arbitration³⁸, or where the parties failed to specify a place of arbitration. Furthermore, if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the assent by one party orally to the contract is sufficient.³⁹

Since the presence of an arbitration clause in a contract does not prevent the contract from being assigned, the assignee can and must enforce his claim by

36. Where a dispute arose with regard to rectification of a confirmation note recording or purporting to record the terms of a commodity transaction between the parties, the issue turned on the construction of the critical words "arising under or out of" of the agreement under the GAFTA Arbitration Rules No.125. See, *Ethiopian Oilseed & Pulses Export Corporation, v. Rodel Mar Foods Inc.*, [1990]1 Lloyd's Rep. 86.

37. To find the intention of the parties involving contracts which were made by telex would prove daunting task for the court before which an application for staying court proceedings in breach of arbitration agreement is made. In the *Dupont* case, YCA (1990) 377, the issue was whether the form of the arbitration agreement in the telex of which one of the terms provided that "LAWS AND ARBITRATION.... SWISS LAW TO APPLY", was valid under the Swiss substantive law. In *Swiss Bank Corp. v. Novorissiysk Shipping Co., (The "Peter Schmidt")* [1995]1 Lloyd's Rep. 202, the construction of the telex was crucial in deciding whether the place of arbitration should be in London or New York.

38. The *Star Texas* case, [1993]2 Lloyd's Rep. 445.

39. *Zambia Steel & Building Supplies Ltd. v. James Clark & Eaton Ltd.*, [1986]2 Lloyd's Rep. 225, 229. It is decided in the case that the quotation, including the printed terms on the back of it, formed part of the agreement of sale, and as a result, the arbitration clause contained in the quotation was incorporated into that agreement. However, this case is criticised that under English law, oral agreement is in excess of the "written agreement" requirement under the New York Convention.

arbitration, unless the clause makes it clear that it binds only the original parties. The mere fact that the claim is connected with the contract does not require the assignee to arbitrate. It is only if he is claiming to enforce the contract that he is bound by the clause. Where the benefit of an arbitration clause passed to the assignee of a claim arising out of the contract containing it, the court shall refer to persons claiming 'through or under' a party to the arbitration agreement in accordance with s.1 of the 1975 Act.⁴⁰

In Scotland, a person may become entitled, as the judicial assignee of rights under a contract, to replace the cedent as a party to arbitral proceedings connected with that contract⁴¹; and the relation to an employer under a construction contract normally carries with it any rights and obligations under any arbitration clause annexed thereto.⁴²

In another case where a claim for indemnity based on a retrocession treaty was made against the third party who had the obligation to follow the fortunes of the reinsured (the defendants) in respect of the reinsurance treaty, but there was no express provision in the retrocession treaty that the retrocessionaires be bound by judgments given or awards made against the reinsured, the third party was entitled to the stay of the proceedings since a difference existed between them in respect of their rights and obligations arising out of the agreement to which the arbitration clause in the treaty referred.⁴³ It is likely that a tribunal of the kind the parties stipulated for in their arbitration clause in such cases is in a far better position than courts to decide whether or not by the words used in the agreement, the third party undertook to be bound by judgments given or awards made against the defendants.⁴⁴

40. *The Leage*, [1984]2 Lloyd's Rep. 259, p.262.

41. *Cant v. Eagle Star and British Dominions Insurance Co.Ltd.* 1937 SLT 444

42. *Whately v. Ardrossan Harbour Co.* (1893)1 SLT 382

43. *Hayter v. Nelson* [1990]2 Lloyd's Rep. 265.

44. *Ibid.*, p.272.

2. Legal Proceedings in Breach of Arbitration Agreement

a. Stay and Damages

In ordinary sense, arbitration agreements produce the effect of giving exclusive jurisdiction to arbitral tribunal. It is similar to agreement to give exclusive jurisdiction to the courts in a given country. An agreement to arbitrate between private parties shows a good indication of the wishes of the parties to refer their disputes to arbitration, gives the parties a possibility of choice of arbitration in preference to ordinary court action, directs the courts to stay or dismiss an action in breach of the agreement to arbitrate, and mandates the unsuccessful party to honour an award against him.⁴⁵ These obligations are safeguarded under arbitration Conventions and observed by national courts.

The rights and obligations of a cause of action which is to be decided by a judge in the form of a judgment are different from those of an agreement to arbitrate. Arbitration agreements are wholly independent of and distinct from the cause of action which establishes the claim referred. The independence of the cause of action again serves to emphasise the procedural character of arbitration agreement.

Where there is an agreement to arbitrate, summons and petition before a court for resolving subject matter between the parties such as an apportionment of liability between the parties to that action, are clearly in violation of the agreement to arbitrate their disputes. Plainly, the parties are not entitled to file their claims with different tribunals at the same time.

When there are court proceedings, the courts shall refer the matter based on arbitration agreement to arbitrate in accordance with Art.II(3) of the Convention. It is most likely that the courts may include the *curial* court or the court which has jurisdiction over the parties. Most international arbitration laws provide that ordinary

45. Fox, 'States and the Undertaking to Arbitrate,' (1988) ICLQ 1, p.6.

litigation should be stayed to refer disputes to arbitration.

Where claims and/or counterclaims are raised before both arbitral tribunal and national court, the party who was ordered to appear before the court for the proceedings may file a request for interim measures before the tribunal and would be entitled to have the lawsuit stayed or dismissed in favour of the arbitration proceedings in accordance with the agreement to arbitrate.

Although a finding by the courts that the dispute exists should be made to justify the stay of court proceedings, the question whether the stay excludes the court from ordering interim measures can be raised. The word “stay” means that the jurisdiction can revive to the original one when the reasons for granting the stay no longer exist. Where a court action is stayed pursuant to the existence of arbitration agreement, the court might make an order removing the stay and allowing the action to proceed if the arbitration agreement or an arbitration begun pursuant to it, should become inoperative or incapable of proceeding.

Where the courts grant a stay because of the existence of a valid agreement to arbitrate, there is no breach of contract in starting legal proceedings. The party in disregard of the arbitration agreement is not liable for damages in the circumstances since the remedy lies in the other party’s own hands under relevant rules and laws.⁴⁶

There takes place no breach of contract and damages as a result of the breach when provisional measures are sought before the competent courts. In accordance with the practice in the courts, such measures may or may not be accepted with regard to arbitration. Neither do breach of contract nor damages take place within the proper exercise of jurisdiction of competent courts which may be *curial* courts or courts having competent jurisdiction over the parties.

It is not difficult to imagine that one of the parties may start legal proceedings for obtaining security for ultimate awards before the courts having jurisdiction over

46. Mantovani v. Carapelli S.p.A. [1980]1 Lloyd’s Rep. 375, p.383.

assets as well as before a *curial* court. Conflict of jurisdiction may happen when legal proceedings are proceeded before foreign courts which are likely to be those of the situs of assets since the parties or administrating authority usually choose a neutral place in which no assets may be situated.

When one of the parties seek provisional measures before the courts other than the *curial* court or the courts having jurisdiction over the parties, the other party may request the competent court, which is either *curial* court or the court having personal jurisdiction over the former party, to exercise discretionary jurisdiction to restrain the prosecution of proceedings in the courts other than the *curial* court or the court having personal jurisdiction.

Although the broad language of an agreement to arbitrate or to give exclusive jurisdiction to the courts in a given country may prevent the parties from pursuing provisional measures from the courts of competent jurisdiction other than *curial* court or the court having jurisdiction over the parties, it is established that legal proceedings for provisional measures are not prevented by such agreements.⁴⁷ Nevertheless, that rule may not apply when the parties agreed to refer their disputes to arbitration as a precondition to any legal proceeding before the courts.

b. Arbitration as a Precondition to Litigation

Some forms of arbitration clause in a contract do more than simply provide that disputes shall be referred to arbitration. They are commonly called *Scott v. Avery* clauses which are common in contracts provided for by associations and organisations based in London. They would seem to have a particular association with international

47. The “Lisboa” (C.A.) [1980]2 Lloyd’s Rep. 546. In the case, the exclusive jurisdiction clause reads as follows:

“Any and all legal proceedings against the Carrier shall be brought before the competent court in London, which shall have exclusive jurisdiction, subject to appeals, if any, pursuant to English law, unless the Carrier expressly declares his option for other jurisdiction or expressly agrees to submit to other jurisdiction.”

commodity contracts and insurance contracts.⁴⁸

Although one may find difficulty in distinguishing an ordinary exclusive jurisdiction clause or arbitration agreement from this form of agreement, the practical effect of such a clause is that unless both parties consent to have the claim tried in an ordinary court, it must be referred to arbitration.

The clauses stipulate, in one form or another, that the award of an arbitrator is to be a condition precedent to the enforcement of any rights under the contract; so that a party has no cause of action in respect of a claim falling within the clause, unless and until a favourable award has been obtained.

Within the competent jurisdiction of the courts, a *Scott v. Avery* clause in appropriate form is sufficient to bar, in the absence of an award, not only the right to sue for damages, but also a claim for ancillary relief, such as an injunction.⁴⁹ Under English law, even in the *Scott v. Avery* type of case, the courts may or must according to whether the arbitration is characterised as international or domestic, on the application of a defendant, hold their jurisdiction in abeyance by granting an order of stay.

It may be suggested that if there is an arbitration clause in a contract and one party in disregard of it starts an action before a foreign court other than the court of the place of arbitration, he will become liable for damages to the other party for having so done. In the circumstances where any form of application for provisional measures is within the arbitration clause, the agreement of *Scott v. Avery* form between the parties

48. GAFTA 100, cl 30; FOSFA, Contract 20, cl. No.20, *Tracom S.A. v. Sudan Oil Seeds Co.Ltd.*(No.2) [1983]1 WLR 1026, [1983]1 WLR 1026, *Comdel Commodities Ltd. v. Siporex Trade S.A.* [1987]1 Lloyd's Rep. 325, *Mavani v. Ralli Bros.Ltd.* [1973]1 WLR 468, *Eagle Star Insurance Co.Ltd. v. Yuval Insurance Co.Ltd.* [1978]1 Lloyd's Rep. 357, *London Steamship Owner's Mutual Insurance Association Ltd. v. Bombay Trading Co. Ltd. (The Felicie)*[1990]2 Lloyd's Rep.21; Thomas, *op.cit.*, p.517.

49. Mustill and Boyd, *Commercial Arbitration* (1989), pp.161-162. but, they added in Note 16 at p.163 that "It is, however, possible that there is an interlocutory injunction, since these do not require the Court to make any conclusive determination of the merits of the dispute."

to the arbitration operates as a bar to any legal proceedings at all.⁵⁰ It follows, therefore, that there is a breach when one of the parties seeks relief from the courts outside the terms of the arbitration clause and in principle, if there is a loss suffered by the other party, such loss can be said to flow from the breach of the arbitration clause of *Scott v. Avery* type. As a result, the arbitrators have power to award damages on grounds that there was a breach of the arbitration clause.⁵¹

C. Attitudes of the Courts in the United States

1. Federal Arbitration Act

Although federal procedural rules generally refer to state practice to determine the grounds upon which provisional measures such as attachments may issue, the FAA introduced federal law, procedural and substantive, into the legal order that governs arbitrations connected with inter- state, foreign, or maritime commerce.⁵² Normally, in cases where both of the parties are citizens of the United States, there is not likely to arise any complex question about the provisional measures under the Convention.⁵³ The

50. In *Mantovani v. Carapelli*, [1980]1 Lloyd's Rep. 375, pp.379-380, the contract No.119 of the GAFTA has a clause numbered 26, which has following provisions:

(a) Any dispute ... shall be settled by arbitration in London in accordance with the Arbitration Rules, No.125...

(b) Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them ... and it is precisely agreed and declared that the obtaining of an award from the arbitrators, umpire or Board of Appeal, shall be a condition precedent to the right of either party hereto or of any person

51. *Ibid.*, p.382.

52. *Southland v. Keating*, 465 US 1

53. In *Coastal States Trading Inc. v. Zenith Navigation S.A. and Sea King Corp.*[446 F.Supp.330(1977), in YCA (1979) 329], Coastal States Trading (Coastal), Delaware, U.S.A., brought an action in the Federal District Court against Zenith Navigation S.A.(Zenith), a Panamanian corporation. The court of the case found that Zenith, although it was a Panamanian corporation, had its principal place of business in New York City, thereby making it a "citizen of the U.S." for purposes of section 202 of FAA, and removing the contract from the terms of the Convention. Thus, the case before the court fell within the exception of the Convention's applicability provided in the section in that the action arises out of a contract, i.e.,

legal relationship between chapters 1 and 2 of the FAA, however, has been of fundamental concern to United States Courts in considering the propriety of pre-award attachment under the New York Convention.

Chapter 2 of the FAA is the implementing legislation for the New York Convention, which entered into force for the United States on December 29, 1970. Chapter 2 republishes the text of the Convention and provides that an arbitration agreement falls under the Convention if it arises “out of a legal relationship, whether contractual or not, which is considered as commercial,” unless the relationship “is entirely between citizens of the United States.” All other arbitration agreements are governed by Chapter 1.⁵⁴

Chapter 1 affords three kinds of pre-arbitration remedies. Section 3 provides that a party to a federal court proceeding may apply to “stay the trial of the action” until the conclusion of the arbitration.⁵⁵ If a party refuses to arbitrate, under Section 4 the aggrieved party may petition “for an order directing that such arbitration proceed in the manner provided for in the arbitration agreement.” When a demand for arbitration may be made later than a certain period prescribed in an agreement or by *lex loci arbitri*, it is the arbitrator who decides whether the demand is time-barred. Since an arbitration is a consensual procedure for resolution of their disputes, the parties should not be enjoined from utilizing that procedure. In the circumstances, the matter should be

bill of lading “entirely between citizens of the U.S.”

54. In *Cordoba Shipping Co., Ltd. v. Maro Shipping Ltd. and International Traders Inc.*, 494 F.Supp.183(1980), reported in YCA (1984) 467, Cordoba, a Panamanian company, brought an action in admiralty against Maro, a Liberian company, as charterer and International Traders, a Connecticut corporation, as its guarantor for alleged default in payments under guarantee and a charter party which contained an arbitration clause providing for arbitration of disputes between “owners and charterers” in New York. The court of the case held that in the case the right to arbitration fell squarely within the provision of section 2 of FAA and not within the section of 201 of FAA since the defendant, Maro, had principal place of business in Connecticut.
55. *Euro-Mec Import, Inc. v. Pantrem & Co., S.p.A.*, the United States District Court for the Eastern District of Pennsylvania, YCA (1994) 781.

referred to arbitration rather than to court action.⁵⁶

The federal courts have granted pre-award attachments in commercial actions where a defendant in a plenary action seeks a stay of the proceeding and an order pursuant to section 3 of FAA directing the parties to arbitration. It appears that the distinction between section 3 and section 4 proceedings is based on whether the court retains jurisdiction over the case. Section 8 provides that where a federal court is seized of “a cause of action otherwise justifiable in admiralty,” a party may commence a proceeding “by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings.” The court shall then have jurisdiction to direct the party to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. On the basis of this express authority, the federal courts have consistently granted attachments in maritime cases under section 8 even though the dispute was to be arbitrated.⁵⁷

While it is clear that pre-award attachment is available under Chapter 1 of FAA, the matter has yet to be decided by the Supreme Court whether the courts in the United States can exercise the power of granting pre-award attachment in aid of arbitration falling into the ambit of the Convention which was given into force by Chapter 2 of the FAA. It seems, however, that there is no obstacle for the court-ordered In Rogers,

56. *The Office of Supply, Government of the Republic of Korea v. New York Navigation Company, Inc.*, 469 F.2d. 377(1972), the question was mainly disputed whether or not a claim for cargo damage was time-barred by application of the parties’ agreement that the carrier and ship would be discharged from all liability unless suit were brought within one year after delivery of the goods.

57. *In Cordoba v. Maro*, YCA (1984) 467, Cordoba obtained an order of District for attachment on International Trader’s deposits with a Connecticut bank (Maro had no funds on deposit at the time of attachment). Maro and International Trader thereafter moved for a stay of the court action pending arbitration and an order dissolving the attachment. In the circumstances where Chapter 1 of the FAA applied, the court held that there was no inconsistency between the goal of FAA in achieving non-judicial resolution of controversies and thus, that the stay available under Chapter 1 did not divest that court of jurisdiction over the controversy between Cordoba and Maro and the court found no inconsistency between the policies underlying FAA and those supporting state law.

Burgan, Shahine & Deschler, Inc.(U.S.) v.provisional measures other than pre-award attachment.⁵⁸

2. Non-interference of the Judiciary

When an arbitration involves international trade, the order of preventing Dongsan from calling a letter of needs guarantee. The court of the case distinguished the relief of non-interference are enhanced by the desire of the parties sought by RBSD from attachment order pending since Dongsan was in no way restricted in its use possession of its assets or arbitration to avoid unfamiliar foreign law. The Convention has considered the problems and created a solution, one that does not contemplate significant judicial intervention until after an arbitral award is made. Those against provisional measures under the Convention generally argue that such interim measures threaten the authority of the Convention and the uniformity of operation envisioned by the drafters, and thus undermine the purpose and effect of the Convention.⁵⁹ They emphasise the nature of arbitration as part of a contractual process, subject to the implicit assumptions of good faith and honesty that permeate the entire relationship. If they are in need of provisional measures, parties are free to include security clauses (e.g. performance bonds or creating escrow accounts) in their agreements to arbitrate. Without such agreement between the disputing parties, the essence of arbitration is meant to be resolving disputes without the interference of the judicial process and its structures.

The strict reading or literal approach taken by some US courts, based upon a

58. In *Rogers, Burgan, Shahine & Deschler, Inc.(U.S.) v. Dongsan Construction Co., Ltd.(South Korea)*[U.S. District Court, Southern District of New York, 30 Nov.1984, 598 F.Supp.(1984) 754, YCA (1987) 528], the court found that every circumstance in the case was in favour of the court's order of preventing Dongsan from calling a letter of guarantee. The court of the case distinguished the relief sought by RBSD from attachment order pending arbitration since Dongsan was in no way restricted in its use or possession of its assets.

59. Homles, 'Pre-Award Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,'(1981) *Va.J.Int.L.*785, p.791, pp.802-3.

strict reading of the relevant statutory language as evidenced by legislative history underlying Art.II(3) and its enactment into U.S. law, was preceded by the decision of the court in the *McCreary* case.⁶⁰ According to this approach, while the Convention does not provide expressly for pre-arbitration security, the list of signatory countries provides assurance to a contracting party pursuant to Art.III of the Convention under which a Contracting State shall enforce awards in accordance with the rules of procedure of the territory where the award is relied upon, and the parties are voluntarily complying with arbitral awards. They also warn that such attachment poses dangers to the overall scheme of international cooperation envisioned by the New York Convention.

Since there is no demonstration for the necessity of preliminary remedies such as pre-award attachment or mandatory injunction under the Convention, they conclude that an award may be enforced through post-award attachment in any Contracting State in which the respondent maintains assets. Furthermore, they do not forget to point out that in the United States, attachment procedures vary from state to state and each federal district court is bound, at least in non- maritime cases, by the procedure of the state in which it sits. It is contended that such an attachment would in fact impede an expeditious arbitration procedure which is the very purpose underlying the Convention.⁶¹ As a result, granting orders for attachment would be the injection of

60. van den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions,'(1989)1 Arb.Int.2, p.15; *McCreary Tire & Rubber Co. v. CEAT S.p.A.* 501 F.2d.1032 (3rd Cir. 1974), YCA I(1976) p.204. The court of the *McCreary* case reasoned that the Convention's language directing a court to refer parties to arbitration was stronger than the requirement that a court simply stayed the trial of the action and oust the courts of all jurisdiction over a dispute subject to arbitration and the Convention. The Court of Appeals in *Robert R. Cooper v. Ateliers de la Motobecane S.A.*[57 NY 2d 408; 442 NE 2d 9239; 456 NYS 2d 728(1982); NYLJ of Dec.1, 1982, p.17, certiorari denied by Supreme Court, in YCA (1984) 482] followed the reasoning of the *McCreary* decision and held that Art.II(3) of the Convention precluded the courts from acting in any capacity except to order arbitration, and therefore an order of attachment could not be issued, and to hold otherwise would defeat the purpose of the Convention.

61. *Metropolitan World Tanker Corp. v. P.N. Pertamina Minjakdangas Bumi Nasional*, 427

uncertainty - the antithesis of the Convention's purpose - that would occur by permitting attachments and judicial proceedings. The reason is that the foreign business entity against which the order is granted would be subject to foreign laws with which it is unfamiliar. In view of the aim of the Convention to avoid the vagaries of domestic law, therefore, pre-award attachment should not be permitted.⁶² From this view, the purpose and policy of the Convention will be best carried out by restricting pre-award judicial action to determining whether arbitration should be compelled.

3. Methods of Referral to Arbitration

a. Conflicting Views

In order that FAA should apply to an arbitration agreement, the US courts require the following four questions answered in the affirmative : (1) Is there an agreement in writing to arbitrate the subject of the dispute?; (2) Does the agreement provide for arbitration in the territory of a signatory country?; (3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial?; (4) Is a party to the contract not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?⁶³

If the court answers these four questions affirmatively, it must enforce the arbitral agreement unless it finds the agreement null and void or inoperative or incapable of being performed. If the court finds that an arbitration agreement is enforceable under the Convention, it must 'at the request of one of the parties, refer the

F.Supp.2 (1975), in YCA (1978) 286.

62. Notes, 'Pre-award Attachment under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards,' (1981) Va.J.Int.L. 785, p.803.

63. Tennessee Imports, Inc.(US) v. Pier Panlo Filippi (Italy) and Prix Italia, S.R.L. (Italy), United States District Court, M.D. Tennessee, Nashville Division, 14 August 1990, 745 Fed.Supp. (1990) pp.1314-1331, in YCA (1991)

parties to arbitration,' pursuant to the Convention Art.II(3). Art.II(3) of the Convention as well as section 206 of Chapter 2 of the FAA which implements the New York Convention empowers the court to direct that arbitration be held in accordance with the agreement, at any place within or outwith the U.S. Once the court refers the parties to the forum which they have selected for resolution of their dispute, then neither the Convention nor FAA provides for further judicial involvement until a party specifically seeks recognition of the award.⁶⁴

Thus, when a claim falls within the scope of an arbitration clause enforceable under the Convention, the court has no choice but to enforce it by referring the parties to arbitration. The proper method of referral, however, has been the cause of some controversy among the courts.

Section 206 of FAA is in contrast to section 3 of Chapter 1 of the FAA⁶⁵ which does not require referral but specifically requires a 'stay of the trial of the action until such arbitration has been had in accordance with the terms of the agreement.'⁶⁶ Unlike section 3 of Chapter 1 of FAA, neither the Convention nor Chapter 2 of FAA provides for a stay of an action pending arbitration. This omission has raised some question as to whether the court, when acting under the Convention may retain jurisdiction over an

64. *Siderious, Inc. v. Compania de Acero del Pacifico S.A.*, 453 F.Supp.22(1978), in YCA (1980) 271.

65. Section 3 of Chapter 1 of the FAA reads as follows:

Stay of Proceedings Where Issue Therein Referable to Arbitration

"If any suit or proceeding be brought in any of the courts of the U.S. upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

66. In *The Anaconda v. American Sugar Ref. Co.*, 322 US 42, 64 S Ct 863, 88 L Ed 1117 (1944), at 1120, the Supreme Court observed that "The section [FAA section 3] obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law. This section deals with suits at law or in equity."

action once the court finds that it falls within an enforceable arbitration clause.

Under section 4 of Chapter 1 of the FAA, the court issues an order compelling the parties to arbitrate. There is no express statutory provision for a stay of juridical proceedings and hence, it may also be argued that the court divests itself of jurisdiction. However, this provision has not been interpreted to deprive the courts of continuing jurisdiction over the action.⁶⁷ The critical phrase in section 4 of FAA is “order ... to proceed to arbitration in accordance with the terms of the agreement.” If the terms of the agreement contemplate the maintenance of the *status quo* pending arbitration, then section 4 gives the court authority to issue an order implementing that part of the arbitration agreement as well as authority to order the parties to arbitrate.⁶⁸ As a result, the fact that the dispute is to be arbitrated should be construed not to deprive the court of its authority to provide provisional remedies in relation to arbitration under the FAA.

Since the New York Convention has only the limited purpose of facilitating the enforcement of arbitration agreement and award on the international level, the word ‘refer’ in Art.II(3) of the New York Convention is construed as meaning that in a technical and procedural sense the court of a Contracting State should issue a court directive staying the court proceedings on the merits. This is the view which emphasises that the clear purpose of the Convention is to encourage resolution of disputes by arbitration without resort to a forum other than that designated by the parties’ agreement, and that once the referral of the parties to arbitration has been made in the

67. By an analogy to the decisions in Admiralty cases, pre-judgment attachment is sometimes granted for non-Admiralty cases. In *Carolina Power & Light Company v GIE URANEX*, [451 F.Supp.1044 (N.D.Cal. 1977), in *YCA* (1979) 336], the court, while maintaining the attachment in favour of the plaintiffs for securing any potential award of pending arbitration in New York under the AAA Rules, observed that “nothing in the Convention itself suggests that it precludes prejudgment attachment.” The court reasoned that it was established that Chapter 1 of FAA, which operated much like the Convention for domestic agreements involving maritime or interstate commerce, did not prohibit maintenance of a prejudgment attachment during a stay of a court action pending arbitration.

68. Comment, ‘Injunctions Pending Arbitration and the Federal Arbitration Act : A Perspective from Contract Law,’ (1987) 54 *U.Chi.L.Rev.* 1373, p.1395.

forum they have selected, the Convention does not provide for further judicial involvement until a party specifically seeks enforcement of an award.⁶⁹

Application for such a compelling order is, however, not in conflict with the purpose of court order in aid of arbitration under the Convention. The reason is that the desire for speedy decisions in arbitration is entirely consistent with a desire to make as effective as possible enforcement of arbitral awards, after they have been made, which is what provisional remedies do. Therefore, the court's power of entertaining an application for a preliminary remedy in aid of arbitration is consistent with the court's powers pursuant to section 206 of FAA because a party's application for a compelling order under section 206 cannot be construed as trying to bypass arbitration.⁷⁰ The obligation of the courts under Art.II(3) of the Convention to refer the parties to arbitration when a valid arbitration agreement has been made, is not intended to preclude courts from ordering provisional remedies and deprive the parties of their right to attachment.⁷¹

b. Dismissal or Stay of Court Proceedings

Chapter 2 of FAA provides some authority for the position that referral to arbitrate does not always mandate an outright dismissal of arbitral issues.⁷² In relation

69. Robert R. Cooper v. Ateliers de la Motobecane S.A., NYLJ, Sep.27, 1980, 414 N.Y.S. 2d 147, 427 N.Y.S. 2d 619, in YCA (1982) 377.

70. Borden, Inc.(U.S.) v. Meiji Milk Products Co., Ltd.(Japan), 919 F.2d. (2nd. Cir., 1990) pp. 822-829, in YCA (1992) 662. The court of the case held that remedies in aid of arbitration were considered more appropriate to be decided by the courts in Japan. It should be noted, however, that, at the time the decision was rendered the site of arbitration - whether New York or Japan - had not yet been determined.

71. Sanders, *Commentary*, YCA (1981) 202

72. In *Cooper v. Motobecane*, YCA (1982)377, Cooper obtained an *ex parte* attachment order in respect of assets of Motobecane in the United States and commenced an action for a money judgment. The action for money judgment was stayed because of the shareholders' agreement between Cooper and Motobecane S.A. which provided for arbitration of disputes over the purchase price of shares under the Rules of the International Chamber of Commerce, to be held in Zurich, Switzerland. Motobecane moved to vacate the attachment order, which motion was

to stay of arbitration, the relevant provisions of Chapter 1 may be construed to be included in Chapter 2 in accordance with section 208 of Chapter 2.⁷³

Although the decision of the *McCreary* case decides that referral to arbitration be mandatory under the Convention and FAA, the court does not see that the language of the Convention and FAA clearly mandates referral to arbitration exclusively in the form of either a dismissal or a stay of arbitral issues. Nor does the court in the *McCreary* case find any language which suggests that the Convention and FAA cannot accommodate both methods of referral.

In a procedural sense, the grant of a stay serves a function of postponing the dismissal of such actions until the completion of arbitration. In the absence of compelling reasons for such a postponement, dismissal for lack of subject matter jurisdiction seems an appropriate measure of referring parties to arbitration.⁷⁴ Here, the availability of dismissal would prevent unpursued claims from languishing unnecessarily and indefinitely on the court's docket. Should parties require subsequent

granted by the Supreme Court of New York County. Motobecane had maintained, and Special Term of the Supreme Court of New York County held that the word 'refer' in Art.II(3) of the Convention required a court to dismiss any action brought under a contract which included an arbitration provision covered by the Convention, and to discharge any attachment rather than to merely stay the proceedings pending the outcome of the arbitration. Cooper appealed to the Appellate Division of the New York State Supreme Court, which reversed the order vacating attachment and reinstated attachment.[446 N.Y.S. 2d 297, in YCA (1983) 421] The court based itself upon the decisions of the cases in contrast with those of both *McCreary* and *The Metropolitan World Tanker*, YCA (1978) 286, which concluded that pre-arbitration attachment was not available under the Convention. However this decision was reversed again in the Court of Appeals for the Second Circuit.

73. Section 8 of Chapter 2 of the U.S. Arbitration Act reads:
"Chapter 1 : Residual Arbitration
Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the U.S."
74. In actions where all claims are found clearly arbitrable, and a grant of preliminary relief would be inappropriate in the case before the court, dismissal is often an appropriate method of referring the parties to arbitration. *Tennessee Imports, Inc. v. Pier Panlo Filippi*, 745 Fed.Supp. (1990); *Technetronics, Inc. v. Leybold-Geaeus GmbH*; *Leybold AG and Leybold Technologies, Inc.*, YCA (1994) 843.

assistance from the court in enforcing or setting aside arbitral awards which clearly contradict federal public policy, the FAA and the Convention provide recognition and suspension procedures. Thus, dismissal, in appropriate cases, acknowledges the FAA's goal of enforcing privately negotiated arbitration agreements and the Convention's concern that signatory countries overcome parochial, protectionist policies and fully recognize the ability of alternative ways to resolve disputes fairly and effectively.

Nevertheless, in certain cases, a stay may be a more appropriate solution. Should, for instance, the court deem preliminary injunctive relief necessary to ensure that the arbitration process remains a meaningful one, a stay would preserve the court's authority to order such relief without unduly interfering in the arbitration of the underlying claims. The Restatement (Third) of the Foreign Relations Law of the U.S. (1986) reaches the same conclusion.⁷⁵

While permanent measures are granted more appropriately as a final award than in the early stages of an action, provisional measures, however, are designed to preserve the *status quo* of the parties in a current action and are available when they are necessary to protect the integrity of the applicable dispute resolution process. Whether provisional measures are available in actions governed by FAA is not a completely settled area of US Federal law, but the majority of courts now appear to hold that a grant of provisional measures is not inconsistent with FAA, provided the court properly exercises its discretion in issuing the relief.⁷⁶

75. Section 487 of the Restatement provides in relevant part:
"under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and subject only to the defence set forth in section 488.

(...)

(2) a court in a state party to the Convention must, at the request of any party to an action, stay or dismiss the action pending arbitration if an agreement to arbitrate falling under the Convention is in effect and covers the controversy on which the action is based."

76. The *Blumenthal* case, 910 F.2d. 1049 (2d Cir. 1990) ; *Merrill Lynch v. Bradley*, 756 F.2d. 1048 (4th Cir. 1985); *Teradyne v. Mostek*, 797 F.2d. 43 (1st Cir. 1986) ; *Gateway Eastern Ry.Co. v. Terminal R.R. St.Louis*, 35 F.3d. 1134 (7th Cir. 1994); *Peabody Coalsales Co. v. Tampa Elec.Co.*, 36 F.3d. 46 (8th Cir. 1994)

III. Two Models on Jurisdictional Relationship

A. Generally

During the arbitration proceeding itself, two methods of proceedings which are equally valid for *ad hoc* and institutional arbitration proceedings merit consideration: exclusive jurisdiction of the arbitral tribunal or concurrent jurisdiction between the tribunal and domestic courts. In other words, in terms of relations between the courts and international arbitration, there may be two basic questions: whether only the arbitrator or arbitral tribunal is exclusively entitled to order interim measures of protection; if not, to what extent the courts have power to order such measures.⁷⁷

Interim judicial remedies may conflict with the authority of the arbitrator, in effect preempting decision on issues normally the arbitrator's to decide. Moreover, such remedies may introduce formality, complexity, and delay into arbitration, the advantages of which are its putative informality, simplicity, and speed. On the other hand, denial of interim judicial remedies may render a subsequent award utterly valueless.

B. Exclusive Jurisdiction

1. Bases

The arbitration agreement is a cornerstone of arbitration. In a broad sense, the arbitration agreement includes the *ad hoc* submission agreements, arbitration clauses contained in main contracts, institutional rules and governing laws of arbitration. These

77. It may be remarked that interim measures were a topic extensively discussed in the framework of drafting the Model Law, particularly regarding the authority of the tribunal and the problems of enforceability (since international treaties do not normally provide that orders for interim measures can be enforced against a recalcitrant party). See, Blessing, 'International Arbitration Procedures - II,' (1989) IBL 451, p.462.

are bases of the authority of an arbitral tribunal to grant an application for interim measures of protection. An arbitral tribunal enjoys an inherent power of granting interim measures of protection which flows directly from the arbitration agreement itself and is sometimes under the supervision of national courts based on arbitration laws or agreement of the parties on a particular substantive law.

When the arbitration agreement specifies that the reference must be brought to the rules of a particular arbitration institution instead of provisions of a national procedural law, or the parties have agreed to procedural rules not linked to any domestic procedural law, then it is suggested that these rules or provisions subject to the international public policy of the law of the place of arbitration must be considered to establish whether an arbitrator has the authority to issue interim measures of protection.

While the procedural law of some countries allows an arbitrator to issue interlocutory injunctions or to order conservatory measures, several other legal systems give this authority to their courts of law only. It is reasoned that the arbitrator is not allowed to make an order of conservatory purpose for lack of enforceability of such an order. In Swiss domestic arbitration, although the source of authority for interim measures of protection is largely to be found in statutory provisions, such provisions do not give much space to the arbitration agreement and rules.⁷⁸

Even though the ultimate enforcement of such an order is reserved to national courts, there is no reason why an arbitral tribunal should not be empowered to grant an order of preservation directed at the parties, but excluding any measures affecting the rights of third parties.⁷⁹

78. Art.26 of the Swiss Concordat on Arbitration on March 26, 1969 allows the parties to submit to the interim measures proposed by the arbitral tribunal while the authority to order them comes only for courts of law. Under Art. 183(1) of Swiss PIL, 1987 which entered into force on Jan 1, 1989, however, the arbitrators are empowered to grant interim measures of protection in arbitrations held in Switzerland where one of the parties has no domicile in Switzerland.

79. As far as an arbitration remains consensual, the third parties may not participate into the arbitral proceedings, even though a particular interim measure is against his interests, or may not be ordered to join as an intervener in a court action. When a provisional measure is

2. Exclusion of Arbitral or Judicial Provisional Measures

Although it is rare to exclude the power of a tribunal to order provisional measures, the power to order them may expressly or impliedly be excluded.⁸⁰ Where the arbitral tribunal is considered to have the power to make interim measures, there may be questions as to whether the parties agree to limit or waive their rights to resort to the courts for interim remedies.

The principle of party autonomy may be invoked to exclude by agreement *any* recourse to municipal courts for the purpose of requesting provisional relief. The principle seems to favour the permissibility of such exclusion agreements and exclusive jurisdiction of the arbitral tribunal would seemingly respect the parties' initial choice of arbitration as the method of dispute resolution.⁸¹ Under a regime of exclusive arbitral jurisdiction, a petitioner seeking provisional measures from a domestic court, would be referred back to the arbitral tribunal.

In accordance with Art.17 of the Model Law, arbitrators are expressly empowered to order interim measures of protection. As far as the parties' right of recourse to the courts is concerned, Art.9 of the Model Law does not provide for an 'exceptional circumstances' test as in Art.8.5 of the ICC Rules. The provision only says that a request by one of the parties before or during arbitral proceedings is not considered incompatible with an agreement to arbitrate. Art.8.5 of the ICC Rules provides that the right of the parties to apply to the courts for provisional or conservatory relief is recognised 'before the file is transmitted to the arbitrator' and 'in exceptional circumstances' thereafter.

Although under Art.8.5 of the ICC rules, the arbitrators are not expressly

considered as undermining the third party's interests, it is most likely that the application for the provisional measures is not granted.

80. Berger, *International Economic Arbitration* (1993), p.332.

81. ICSID Arbitration Rules 39(1), 39(5)

authorised to issue such measures, it can be construed that the relevant powers are reserved to the arbitrators. The reason is that after the constitution of an arbitral tribunal, an application before the courts for such measures is accepted only 'in exceptional circumstances.' Art.8.5 may effectively be said to constitute a limited waiver of judicial recourse in 'non-exceptional' circumstances during the course of the arbitration, when the parties should, to the extent feasible, apply for relief to the arbitral tribunal.⁸²

It seems from the language of Arts. 9 and 17 that there can be optional choices for the parties in need of provisional measures from the courts as well as from the arbitral tribunal. The intention of the provision of Art.9 of the Model Law is neither to mandate nor exclude the taking of such measures by an arbitral tribunal, but rather to defer to the wishes of the parties and/or the arbitrators and possible applicable provisions of national law. The parties may agree to limit their rights to recourse to courts under the Model Law, since it is clear that Art.9 of the Model Law does not affect any agreement by which parties have agreed that they will not resort to a court for interim measures.⁸³

Where the parties do not agree on special terms for limitation or waiver of recourse to courts, there may arise conflicts between the principle of party autonomy and the exercise of powers of the courts. Given that Art.8.5 of the ICC Rules authorises a party to apply to a court for interim measures only in 'exceptional circumstances' since the arbitrators have been appointed and received the file from the ICC, it may be said that this 'exceptional circumstances' test affects the parties' right with the result of limitation or waiver of judicial recourse. The question whether Art.8.5 of the ICC rules can be interpreted to have the effect of excluding the powers of the courts based on

82. Schwartz, 'The ICC Arbitration Rules and the UNCITRAL Model Law,' (1993) *Arb.Int.* 231, p.240.

83. Holzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*(1989), p.333.

statutes or the Model Law depends on how the requesting court interprets the 'exceptional circumstances' test.

This question may arise not only in circumstances in which the parties have agreed to refer their dispute to arbitration in accordance with ICC Rules in a Model Law country, but also in situations in which an international arbitration is agreed in a country where the relationship between the court and arbitration is close. As it was shown in a recent case before the House of Lords of the United Kingdom to which the exercise of discretionary powers of the English court was related, Art.8.5 of the ICC Rules is not to be construed as excluding the statutory powers of the courts.⁸⁴ A similar answer will be found in a Model Law country since the right of the parties in accordance with Art.9 of the Model Law is larger than that under Art.8.5 of the ICC Rules.

When the parties agree in express terms to exclude the choice of judicial recourse for provisional measures, there may arise in a rather different context the question whether the parties may agree expressly to exclude a particular remedy from the courts without a violation of public policy in a given country. Such agreements may not be accepted because they violate public policy.

When arbitral proceedings in an international arbitration are governed by a national procedural law different from the law of the place of arbitration, or by supranational arbitration rules such as UNCITRAL Arbitration Rules or ICC, LCIA Rules, the arbitrators must base themselves on the law of the place of arbitration, bearing in mind that their authority under it may be different from the authority which they would have under the procedural rules which govern those arbitral proceedings. In the United States, it was questioned whether the parties were permitted to eliminate admiralty procedures under section 8 of FAA for the purposes of seizure of a vessel.⁸⁵

84. S.A. Coppée Lavalin N.V. v. Ken-Rem Chemicals and Fertilizers Ltd.(in Liquidation in Kenya), [1995]1 AC 38 (HL(E)), [1994]2 WLR 631, p.638.

85. *The Anaconda*, 322 US 42. The pertinent part of the arbitration agreement in question states as

It was held that although the parties had agreed to arbitrate, the traditional admiralty procedure with its concomitant security should be available to the aggrieved party without in any way lessening his obligation to arbitrate his grievance rather than litigate the merits in court.

Where the exclusion agreement between the parties is not allowed in the place of arbitration, the parties would not want to take the risk of the subsequent award being set aside. Even where there is no restriction of the exclusion agreement from the application of *lex loci arbitri*, the agreement may not be allowed by a foreign court before which a provisional measure is sought. When there are proceedings for provisional measures before foreign courts, there may be disputes not as to whether there are valid agreements to arbitrate, but as to whether there are valid agreements to exclude judicial provisional measures.

The New York Convention only requires that merits of disputes must be referred to arbitrators so as to be decided in accordance with the parties' agreement to arbitrate. It is true to say that application for provisional measures before the courts may step into the assessment of merits since the lines between substantive and provisional matters are not easily drawn.⁸⁶ It is generally accepted that the thrust of the New York Convention does not compel the parties to choose the provisional measures before the arbitrators. Where there is an agreement between the parties to limit their options to provisional measures before the arbitrators, their agreement would be observed by foreign courts.

Nowadays, many jurisdictions limit the supervisory jurisdiction of their courts to exceptional instances or exclude it in the whole area of substantive issues. Even where

follows: "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge ... pursuant to this provisions of the United States Arbitration Act ... except that the provisions of section 8 thereof shall not apply to any arbitration hereunder."

86. From the difficulty of drawing lines between substantive and procedural matters, the arbitrators are required to apply the laws of arbitration governing substantive matters as well as the *lex loci arbitri* governing procedural matters.

procedural matters are concerned, the courts in Belgium will not grant provisional measures in an arbitration sitting in Belgium as between the parties who are not Belgian nationals or not incorporated in Belgium. Although a public policy defence may be invoked under the New York Convention with regard to the validity of the agreement to exclude judicial provisional measures, the scope of the defence could be narrowly construed in many jurisdictions.

It can be submitted that the Contracting Countries to the New York Convention are most likely to allow the parties to agree to exclude in express terms any judicial provisional measures and not to negate such agreements on the ground of violation of public policy. When parties agree to exclude in express terms provisional measures before the courts, the courts may not grant an application for provisional measures before them because of the express terms in the agreement. In many instances, however, the parties will not be able to foresee the details of the case and consequently are not in a position to evaluate the merits and results of the exclusion of the courts' competence for interim relief.⁸⁷ It may be safe to recommend that the two options be left open to benefit the parties since these options have different features.

3. Advantages of Arbitral Provisional Measures

Speed is a very important feature in an arbitration. Popular institutional rules are designed to increase the speed in arbitral proceedings. Nowadays, most countries are also keen on such advantage from arbitral proceedings compared to ordinary litigation.⁸⁸ Normally, arbitrators are chosen in consideration of their expert knowledge.

87. Berger, *op.cit.*, p.351.

88. Delphi Petroleum Inc. v. Derin Shipping & Trading Ltd, (1993) 73 FTR 241 (Can F.C.), reported in Tetley, 'Canadian Maritime Decisions 1994- 1995,' [1996]1 LMCLQ 123; Case Law on UNCITRAL Texts (CLOUT) case 68, YCA XX (1995). While the Federal Court of Canada in the case had jurisdiction to hear a motion to compel the interrogation of a third party witnesses, as an "interim measure of protection" pursuant to Art.9 of the Canadian Commercial Arbitration Code (the UNCITRAL Model Law, 1985), the court was wary of the possibility of aiding "dilatatory tactics of the party" by such measures and sought to ensure that the measures

Once an arbitral tribunal is constituted, the greater expertise of arbitrators in the matter in dispute is thought to enable the arbitrators to decide on a petition for provisional relief with greater speed than their judicial counterparts. Besides the consideration of speed, arbitral provisional relief is thought to be less costly than a comparable procedure in a domestic court, because an appeal against the arbitral provisional order to a second arbitral tribunal is not possible.⁸⁹ For provisional relief before national courts, arbitral procedure may have to be stopped until a certain condition required by the courts is met. An arbitral procedure for provisional relief is thought to have fewer disruptive effects on the arbitral proceedings than a court procedure. Thus, an aggrieved party may be motivated to prefer to petition arbitrators rather than national courts for provisional relief.

International arbitrations, unlike domestic arbitrations, usually involve parties of different nationalities. They choose arbitration in consideration of its neutrality. In international settings, an arbitrator's competence to issue provisional measures is thought to avoid perceived risks of resorting to foreign courts and being subjected to the vagaries of foreign laws. Extended debate before foreign courts may make many advantages from arbitration ineffective.

Further, arbitration is preferred for the reason that the parties resolve their disputes confidentially. Sometimes, the confidentiality is taken more seriously than the advantage of a speedy result.⁹⁰ An arbitrator's decision on interim relief is, like an arbitral award, certain to remain confidential, whereas a motion for provisional relief brought in a domestic court is likely to have the undesirable effect of revealing to the public the existence of a current dispute between the parties to the arbitration

would make the arbitration efficient.

89. According to Art.1050(1) of the Dutch Act, there needs an agreement between the parties to make an appeal to the award possible.

90. M. Collins, 'Privacy and Confidentiality in Arbitration Proceedings,' 30 *Tex.Int'l L.J.* 121(1995)

proceedings, which may in turn reveal a confidential business relationship and disclose important trade secrets or damage a party's commercial reputation.

For the maximum effect of advantages anticipated from an arbitration agreement, parties may need to be restrained from any recourse to national courts for preliminary purposes. Art.13.2 of the LCIA Rules provides that the parties shall be taken to have agreed to apply only to the tribunal (and not to any court of law or other judicial authority) for orders under Art.13.1(g),(h) and (i) (thus including interim measures of protection).

Despite the advantages parties may gain from an arbitral provisional relief procedure, there still remains a highly controversial issue of whether, and if so to what extent, a party may obtain provisional relief from the arbitral tribunal or other party-appointed authority.

4. Limits of Arbitral Provisional Measures

a. Time-consuming Procedure of Constitution of Tribunal

Despite many advantages, the international arbitral process is relatively unsuited to rapid provisional solutions, even though an arbitration is considered as a preferable method of deciding on merits in a speedy way. Contrary to proceedings before domestic courts, an international arbitral tribunal which is normally composed of three arbitrators all operating in different countries is usually not permanently available but meets only for the hearings which can turn out to be a major disadvantage in cases where urgent measures are required. Arbitrators cannot take any provisional measures until the tribunal has been constituted, which can be a very time-consuming process. When the parties are feeling strongly opposed to each other, the cooperation of both parties for the speedy composition of the arbitral tribunal is hard to obtain. Before the arbitral tribunal has been constituted, and without a clause stipulating a Pre-arbitral Referee Procedure, the party seeking interim or conservatory measures has no

alternative but to address its request to a national court.

To deal with the necessities of resolving disputes on a provisional basis, the parties may agree to set up a permanent body whose members meet regularly during a project to see if there is any dispute to deal with, or to give the Chairman of the arbitral tribunal, if appointed, power to decide matters of a provisional nature. In order that an arbitral tribunal should be given permanence to deal with matters arising from time to time during the project, there must be some consideration of costs between them for the maintenance of a special body for provisional measures and for the performance of the project with some provisional matters left unresolved.

b. Reluctance Based on Equal Treatment of Parties

In addition, arbitrators themselves have been somewhat hesitant to exercise the powers to issue provisional relief, either because they do not wish to appear to favour one litigant at an early stage of the proceedings⁹¹, or because they become concerned with the effect of certain orders for provisional measures with the possibilities of incurring injustice to the third parties as well as the party against whom the orders are made. The arbitrator's decision that he is empowered to make a particular order for conservatory measures may be attacked on the basis of the principles of equal treatment even though the attack could not touch upon the issue of the arbitrator's immunity.⁹²

c. Incomplete Rules on Provisional Measures

The authority of the arbitrator is derived from express terms of reference, or institutional rules or international regulations by the incorporation of such rules into the agreement to arbitrate. Without terms of reference in the arbitration agreement or

91. Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission, [1994]1 Lloyd's Rep. 45. Although there were unreasonable delay caused by Indian parties, the arbitrators could not exercise default powers.

92. Lew, ed., *The Immunity of Arbitrators* (1990), p.27.

institutional rules, the domestic law provisions of the *lex loci arbitri* would apply.⁹³ By that agreement which incorporates the rules of a particular arbitration institution or municipal laws, further remedies may exist under the rules and laws. Beyond the level of domestic law, there is less concrete definition on court assistance, provisional remedies, provisional or interim relief, interim measures of protection, conservatory measures and so on. While in most jurisdictions the powers of domestic courts to issue provisional relief rest on clearly formulated statutes, the legal bases for arbitral provisional relief are still an ill-defined area of the law. Unlike domestic courts, most international arbitration tribunals cannot refer to comprehensive and detailed sets of procedural rules, but often operate in a legal vacuum. Where there are no or few rules on provisional measures, the arbitrators are inclined to be cautious about exercising their powers on provisional measures.

Although it is theoretically conceivable for the parties to provide contractually for arbitral provisional relief in those procedural stages (by nominating an arbitrator for this purpose), it is accepted that an arbitral tribunal is in most procedural stages of the arbitration process ill-equipped to issue provisional measures. It is probable that arbitration tribunals, both domestic and international, may at times rely on inherent powers to issue provisional relief.⁹⁴

93. According to section 1 of the Administration of Justice (Scotland) Act 1972, the court in Scotland has power to order production by the parties to the action or third parties or documents which are relevant to the case as shown in the pleadings and not confidential. While Art.27 of the Model Law provides that the court may execute the request for discovery within its competence and according to its rules on taking evidence and recovering of documents, the use of the procedure before an arbitration has started may not easily be available in the case of an international arbitration where the parties are not situated in Scotland or otherwise subject to the jurisdiction of Scottish courts. Since Art.27 is worded to give the arbitral tribunal competence on its own account to seek such assistance from the court, if it is expressly clear in the arbitration agreement that the place of arbitration is to be Scotland, that will suffice to give the Scottish courts jurisdiction at that stage.

94. Quite similar to inherent powers, implied powers do not arise from a tribunal's authority to enforce the law, but derive from an implicit consent of the parties. According to the concept of implied powers, parties implicitly agree to transfer to the tribunal all powers necessary to achieve its goals at the time they submit their dispute to the tribunal.

In some countries, such as France and Switzerland in which delocalisation theory is widely accepted among scholars and practitioners, arbitrators are considered to have an inherent power to make a provisional order during arbitral proceedings. Where the inherent power is not found in the express terms of agreements or statutes, the arbitrators draw the inherent power from the implied intention of the parties to agree to refer their disputes to arbitration and to give inherent or implied power to the arbitrator for enhancing the effectiveness of arbitration.

It appears, however, that the idea of inherent power rather opposes the concept prevalent in some Civil law countries such as Germany, Korea, Japan and other countries of the German law tradition. In such countries, the governing principles of legality prescribe that the exercise of state power be based on a statutory foundation. Therefore, the concept that the arbitrator is able to exercise far-reaching powers which have not been conveyed to him by the parties to an agreement is arguably in contradiction with the fundamentally consensual character of arbitration.⁹⁵

d. Lack of Proficiency in Dealing with Procedural Matters

It is sometimes contended that arbitrators, especially if they are non-lawyers, may lack the proficiency required to handle adequately a provisional remedies procedure. As a result, it is argued that arbitral provisional relief affords both the petitioning party and the responding party less legal protection than comparable domestic court relief. The majority of commentators, courts and legislatures were strongly opposed to the idea of private individuals rather than ordinary courts ordering provisional relief in the context of arbitral proceedings.⁹⁶ All in all, the absence of a

95. Hansmaninger, 'The ICC Rules for Pre- Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration?' (1992) ICSID Rev. - FILJ, 82, pp.93-94.

96. Hürlimann, 'International Arbitration in Switzerland - First Experience With the New International Arbitration Law,' [1994] ADRLJ 8, p.13.

stable, readily available form has led to the view of domestic courts as the only suitable institutions for granting speedy relief in those instances.

e. Ineffective Enforcement

Under most legal systems, the exercise of coercive powers is traditionally reserved exclusively for state officials. Although an arbitral tribunal might order against a party conservation of goods, sale of perishable merchandise, or restraint of calling on a guarantee during arbitration, depending on the applicable arbitration law, it should still be left to the domestic procedural law to determine whether such measures could be enforced.⁹⁷

The arbitrators have no power to seize assets, or to order banks to freeze the accounts of one of the parties, or to produce or inspect certain documents of third parties'.⁹⁸ These powers are an integral part of general procedural law applied by the court. At best, arbitrators may draw their conclusions from non-compliance with such an order, although it is not always clear what these conclusions may be.⁹⁹ Parties prefer to go to a national court for an injunction or similar measure prohibiting a demand for payment under guarantee.¹⁰⁰

While awards contain final decisions on the merits, which can be overturned on limited grounds only, provisional measures by their very nature of temporary effect may not prejudice the substance of the case and may be modified and revoked easily. In terms of speed and cost it may be more convenient to use enforcement procedure for judgment or arbitral award available to the successful party rather than to request

97. Holzmann and Neuhaus, *op.cit.*, p.337.

98. The prevailing doctrine in Germany still maintains that interim relief is not available from the arbitral tribunal because the arbitrators' decision is not enforceable. Berger, *op.cit.*, p.333.

99. Tschanz, 'International Arbitration in the U.S.; the Need for a New Act,' (1987)4 Arb.Int.309, p.321.

100. *Commentary on Court Decisions on the 1958 New York Convention*, YCA (1987) 403, p.445.

provisional remedies or court assistance during the arbitration before the Court.¹⁰¹

Normally, if judgment is ultimately given in the plaintiff's favour and the defendant has no or insufficient money to satisfy it, execution can be made against his other assets.¹⁰² If necessary, insolvency proceedings can be brought against him and his assets can be applied in satisfaction of his creditors generally, so far as they are sufficient for the purpose, and any previous dealings with assets which amount to fraudulent conveyances or preferences may be set aside for this purpose.

Under Art.VI of the Convention of 1958, if an application for setting aside or suspension of an award has been made to a competent authority referred to in Art. V(1)(e) of the Convention, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the enforcement of the award.¹⁰³ In consideration of general interests in facilitating the enforcement of foreign arbitral awards, however, it is not appropriate for the court of an enforcing country to await the decision of the question of enforcement of the arbitral award in other jurisdictions.¹⁰⁴

101. As of January 1, 1995, the number of country adhering to the New York Convention reached the figure of 102. See, Graving, 'Status of the New York Arbitration Convention : Some Gaps in Coverage but New Acceptances Confirm its Vitality,' (1995) ICSID Rev.-FILJ 1.

102. Under English law, garnishee proceedings can be a powerful weapon in the hands of lawyer wishing to enforce his client's judgment against a defaulting debtor, while the bank served with a garnishee order nisi becomes liable to both sides. See, Cohn, 'Garnishee orders and foreign banks,' 1994 SJ 502; *DST v Rakoil* [1988]2 All ER 833; *DST v SIT Co* [1988]3 WLR 230.

103. *Karl F.Ungerer GmbH (Germany) v. Rapid Metaal B.V. (Neth)*, Gerechtshof [Court of Appeal]'s Hertogenbosch 28 Oct. 1994, President, Court of First Instance, Maastricht, 15 June 1994, YCA XX(1995) Netherlands, no.17. In the case, it was disputed whether the enforcement of an award should be postponed until the challenge proceeding against the award was pending before foreign courts. The Court of Appeal reversed the decision rendered by the President of the Maastricht Court of First Instance and granted enforcement for the reasons that setting aside proceedings pending before the Danish courts were an insufficient ground for adjourning the decision on the requested enforcement. The Court disagreed with the President and based itself on the ground that Art.VI of the Convention left room for deciding whether the enforcement decision must be adjourned or not.

104. *Datema Aktiebolag v. Forenede Cresco Finans AS*, Sweden: Supreme Court, 23 Nov. 1992, No. Sö 653, YCA (1994) 712.

Therefore, the enforcing court may, on the application of the party on the enforcement of the award, order the other party to give suitable security.¹⁰⁵

For the enforcement of provisional measures by arbitral tribunal, most legal systems merely provide for the enforcement of arbitral awards, but not of arbitral orders of provisional measures, by national courts.¹⁰⁶ Although the term “award” in Art.I of the New York Convention could be interpreted to include provisional measures, most commentators conclude that the grounds of refusal mentioned in Art.V(1)(b), (d) and (e) of the Convention indicate that the Convention does not envisage the enforcement of provisional measures ordered by arbitrators. Thus, from the legal nature of most provisional orders it is thought to be inappropriate for arbitrators to issue these measures.

f. Gaps of Institutional Administration of ICC Court

Although entrusted with the responsibility to ensure the proper application of

105. *Soleh Boneh v. The Government of Uganda* [1993]2 Lloyd's Rep. 209, p.213.

106. *In Resort Condominiums Int.Inc. v Bolwell and Another*, 118 ALR 655, an arbitrator sitting in the city of Indianapolis, Indiana, USA, made an “interim arbitration order and award” in essentially the same terms as that ordered by McInney J., a judge of the US District Court, granted a preliminary injunction against the second respondent (RCI Aust) and made certain procedural orders concerning the conduct of the dispute including a direction that all further orders be stayed pending arbitration between the parties as required by the licence agreement. When the applicant, RCI sought enforcement of this award in Queensland, Australia, the second respondent, RCI Aust opposed enforcement on the grounds that the award was not a foreign award as defined by the Australian legislation on international arbitration. The Australian court refused to recognise the arbitration on grounds that the reference to “arbitral award” in the New York Convention did not include an interlocutory order made by an arbitrator but only an award which finally determined the rights of the parties, and that even if the expression “arbitral award” was construed as including a valid interim award, the orders made by the arbitrator could not properly be characterised as an interim award which must determine at least some of the matters in issue between the parties. According to s. 8(7)(b) of the Act (Art V(2)(b) of the New York Convention) which was effective in Queensland, or alternatively in the exercise of discretion, the court found that many of the orders made by the arbitrator were contrary to the public policy of Queensland not only in the sense that many of them as drafted would not have been made in Queensland, particularly without undertakings as to damages and appropriate security and in certain other respects, but also because of possible double vexation and practical difficulties in interpretation and enforcement.

the ICC Rules, the ICC Court nevertheless would refrain from adopting the institutional position as to whether an ICC tribunal has the power under the ICC Rules to issue interim relief. Rather, its function is to provide an administrative framework within which arbitrations can be conducted, and its participation is in the main limited to the early and the concluding stages of dispute resolution, leaving the decision-making function to the arbitrators appointed pursuant to the ICC Rules.¹⁰⁷ To their 'legitimate' inquiries, the Secretariat of the ICC Court of Arbitration may advise arbitrators of the practice of other ICC tribunals with respect to requests for interim relief, but will leave it for the arbitrators to decide both whether they have the authority to issue interim relief under the ICC Rules and whether they should grant the requested interim relief under the particular circumstances of the cases before them. This practice shows that the 'gap' in the ICC rules with respect to which arbitrators have sought guidance from the ICC Court and its Secretariat is the absence of a provision explicitly authorizing the arbitral tribunal to grant provisional or conservatory measures requested by parties.¹⁰⁸

g. Pre-arbitral Referee Procedure

Interim measures of protection are often necessary for long-term construction contracts.¹⁰⁹ Where a dispute is in need of impending, though probably provisional, decision, the Pre-Arbitral/Dispute Review/Resolution Advisory Boards/ Procedures are intended to be utilised.¹¹⁰ The orders or recommendations of the Dispute

107. Arts.1, 12, 21 of the ICC Rules of Arbitration. The *Ken-Ren* case, [1995]1 AC 38 (HL(E))

108. R. Smit, 'An Inside View of the ICC Court,' (1994) *Arb.Int.*53, p.58.

109. Campbell, 'Dispute Review Boards,' (1994) 60, *JCI Arb.* 1, 17

110. The parties may themselves consider whether, in the framework of an arbitration clause, they may confer to the arbitrator a broad power as per the UNCITRAL Arbitration Rules, including the power to make provisional orders, to direct interim measures of protection or, for example to order a continued performance under a long-term contract irrespective of the pending arbitration; alternatively, parties may consider in the framework of their arbitration clause to make provision for an arbitral referee(as per the ICC Pre-arbitral Referee Procedure), or to provide for a Dispute Review Board or a Claims Review Board which will regularly or occasionally meet during the term of the contract, or, for example, during the construction

Review/Resolution Board or Adviser, a Technical Expert or a Pre-Arbitral Referee of the Board are not binding on either party, but are subject to be set aside or overruled by a later arbitral panel. Both parties, however, will thoroughly consider and place great significance on the findings of an impartial and respected panel. With an established Board to address disputes, as they arise, construction may continue with the contractor's and the owner's experts focused on the work, not on the claims.¹¹¹ Among such complementary procedure to arbitration, the ICC Pre-Arbitral Referee Procedure¹¹² is well-known.

The Pre-Arbitral Referee Rules are designed to provide for the resolution of contractual disputes that need a quick response and thus cannot await the award of an arbitral tribunal. It has been established that arbitral relief powers under Art.8(5) of the ICC Rules may be exercised only *after* the arbitral tribunal has been constituted, while the Rules apply to the situation *before* the tribunal has been seized. As an exception,

period to decide on disputes on a preliminary basis on the understanding that the parties shall abide by the directions given by such Board, subject to a final determination after completion of the contract, be it in the framework of a mutual agreement or in the framework of an arbitration or other procedures.

111. In the *Channel Tunnel* case, [1993] AC 334, the parties made a contract which contained a dispute settlement clause which was patterned on clause 67 of the FIDIC Civil Engineering Conditions. In the clause, the preliminary reference to the engineer, as stipulated in the FIDIC clause, was replaced by reference to a "panel" of three. This panel must make its decision within 90 days. The aggrieved party may then bring arbitration proceedings under the ICC Rules. During the course of the tunnel's construction, a number of disputes arose and were submitted to the Panel. Some of the disputes were settled after their referral, others had to be decided by the Panel. This system was discussed in the decision of the House of Lords. On 23 April 1992, the Employer, Eurotunnel, lodged a request for arbitration with the ICC, seeking to set aside a decision of the Panel. Within two months of this request, the Arbitral Tribunal had been formed and the Terms of Reference had been agreed between the Tribunal and the Parties. On 30 September 1992, 5 months after the Request for arbitration, the Arbitral Tribunal made a Partial Award which set aside the Panel decision and substituted for it a provision for the retention by TML of sums which previously had been paid under the Panel's decision. For the details, see Schneider, 'The Reform of Commercial Arbitration Practice: Major Construction Cases and How they are dealt internationally,' in *Conference on the Reform of Commercial Arbitration Procedure*, London, 1994.

112. The ICC "Rules for a Pre-arbitral Referee Procedure," (ICC Referee Rules, ICC Publ.No.482, (English version) 16 YCA 240(1991)) entered into force on Jan.1, 1990.

Art.2.4 of the ICC Referee Rules provides that if the competent jurisdiction becomes seized of the case after the appointment of the Referee, the Referee shall nevertheless retain the power to make an order within the time provided by Art.6.2 [30 days from transmittal of the file] unless the parties otherwise agree or the competent jurisdiction orders otherwise.

The ICC Referee Rules represent a further step in the overall tendency to develop and strengthen alternatives to provisional court relief. On the one hand, although they do not expressly mention this purpose, the Referee rules are intended to complement and to clarify the existing framework of provisional remedies in ICC administered arbitrations.¹¹³ On the other, the ICC Pre-Arbitral Referee Procedure is a recognition by the ICC itself that in some instances, arbitration is either too expensive, too time-consuming, but more specifically, too late to resolve a dispute which requires immediate, albeit potentially temporary, resolution.¹¹⁴

C. Concurrent Jurisdiction

1. Generally

As international arbitration has developed, there is a growing interest in the availability of effective interim or conservatory relief before national courts in conjunction with potential or pending arbitration proceedings. For instance, the plaintiff's problem of executing judgment against the defendant's assets is exacerbated in modern times by the ease and speed with which assets may be transferred overseas, particularly where they are in, or include money in a bank account, which, by a few words spoken into a radio telephone or tapped out on a telex machine, can be transferred within seconds to a bank which is untraceable or where the balance cannot

113. Hansmaninger, *op.cit.*, p.100.

114. Arkin, 'Pre-Arbitration Dispute Resolution : What is it, Where is it, and Why?,' (1993) IBL 373, p.377; Craig, *et.al.*, *International Chamber of Commerce Arbitration* (1990), p.421.

be reached by effective legal process.¹¹⁵

In the past, parties to international contracts found themselves in between neutrality of arbitration which demanded that the parties should not seek provisional measures from the courts, and effective prevention of damages by the time an arbitral tribunal was constituted, received evidence, and completed its deliberations.¹¹⁶ Since arbitral powers to grant provisional relief are curtailed in scope and legal effects, the court would have to retain jurisdiction to order those measures which the arbitral tribunal cannot impose.¹¹⁷ The primary alteration from the exclusive model was to provide not only that a party could request interim measures but also that a court could grant such a request.

2. No Tribunal or No Power of Arbitral Tribunal

It may be unusual if a party obliged to arbitrate subject to contractual or statutory provisions were entitled in anticipation of the arbitration to apply to ordinary courts for an order for procedure which the arbitrator subsequently appointed was not empowered himself to authorise.

In the pre-constitution stages of arbitration proceedings, however, it seems sensible that domestic courts should have jurisdiction to order provisional relief. Prior to the establishment of arbitral tribunal or before the file has been transferred to the tribunal under the rules of ICC, there is no arbitrator or an incapacity of the tribunal to entertain an application relating to procedural matters. In the circumstances, it will be

115. Rose, 'The Mareva injunction - Attachment in personam - Part 1,' (1981) LMCLQ 1, p.2; van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Convention,' (1987)2 ICSID Rev.-FILJ 439.

116. Paulsson, 'A Better Mousetrap : 1990 ICC Rules for a Pre-Arbitral Referee Procedure,' (1990) IBL 214, p.215.

117. It can be assumed that the parties have agreed to an arbitrator's powers to issue provisional relief under the presumption that they will get speedy relief. Should the arbitral tribunal fail to decide on a motion for provisional relief with the required speed, jurisdiction should revert to the domestic courts, who are thus to have subsidiary competence to issue the required relief.

to the courts to whom the parties can be expected to refer for provisional relief in the absence of a mechanism such as the ICC Pre-Arbitral Referee Procedure.

In Scotland, an application can be made to the Court of Session or Sheriff Court under section 1 of the Administration of Justice (Scotland) Act 1972.¹¹⁸ Even before¹¹⁹ or during¹²⁰ the arbitration, it may also be possible to petition the *nobile officium* of the Court of Session for documents with recovery, which is accepted at common law.¹²¹

3. Procedural Advantages

There is the situation where the conduct of the defendant is related, not to the claim in respect of which he seeks a stay, but to some other claim of his own which also falls within the agreement to arbitrate. For example, the respondent may have started his own action in respect of the contract in some foreign jurisdiction, in order to gain a procedural advantage, such as an order for *saisie conservatoire* which he could not obtain through the medium of arbitration.¹²²

Since national courts are expected, and indeed obliged, under the New York Convention to execute international awards, it is most likely that they should be able to

118. Anderson v Gibb 1993 SLT 726

119. Galloway Water Power Co v Carmichael 1937 SC 135

120. Crudens Ltd, Petr, 1971 SC 64.

121. MacSporran & Young, *Commission and Diligence* (1995), para.8.4.

122. Mustill and Boyd, *op.cit.*, p.486; Pre-judgment attachment is called, in France, *saisie conservatoire* if it is aimed at the garnishment of a claim of the debtor against a third party, *saisie arret*. *Saisie conservatoire*, which may be translated literally as “preservative seizure” has been defined as seizure of a provisional nature of the moveable assets of the debtor for the purpose of preventing him from disposing of them or parting with them. The provisions of Arts. 48 *et seq.* of the French Code of Civil Procedure (Old) give the national judge the power to order such measures in cases where real estate is involved, “if the credit appears to be well-founded in principle” and “in the event of urgency, if the recovery of the debt seems at risk” The same applies in the case of personal property so far as the application of measures of non-disposal of a conservatory nature is concerned. See, Pluyette, ‘A French Perspective,’ in *Conservatory and Provisional Measures in International Arbitration* edited by The ICC International Court of Arbitration (1993), p.82.

provide for interim measures of protection such as attachment as security in advance of the award even in the absence of a contractual stipulation to that effect. While the ultimate disposition of such interim measures of protection will be determined by the final award of the arbitrators, the parties to the arbitration, as well as third parties, will in the meantime be required to obey court orders.

4. Compatibility of Request for Provisional Measures

a. European Arbitration Convention

Unlike the New York Convention on the matter as to whether the Convention allows provisional measures before or during arbitration, Art.VI(4) of the European Convention of 1961 provides that a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court. The words “judicial authority” of Art.VI(4) include both courts of law and executive authorities which have competence under the law of some countries to make provisional orders. Although there is no express provision, it should be noted that nothing in Art.VI(4) would prevent the arbitral tribunal from granting provisional measures.¹²³ Paragraph 4 concerns more particularly the situation whereby the property in dispute or the assets of either party in respect of which a request for attachment or security is filed, are situated in a country other than that of the arbitral tribunal.¹²⁴ The rationale for Art VI(4) is that application to the court for assistance with interim measures does not mean that the party from whom the request emanates intends to forego arbitration.¹²⁵ It aimed, therefore, at ensuring full co- operation on the part of the

123. Commentary, ‘European Convention on International Commercial Arbitration of 1961,’ YCA XVII(1992) 711, p.735.

124. *Ibid.*, p.734.

125. *Ibid.*, p.735.

courts with regard to arbitration proceedings conducted in foreign states.

Even in a case where both parties were related to different Contracting States, but where a party had brought a suit for attachment of the defendant's property in the courts of a non-Contracting State, an action for securing the claim could not be regarded as inconsistent with arbitration proceedings in accordance with Art.VI(4).¹²⁶

In accordance with this text, however, there is no international obligation upon the Contracting States to have any measures granted with regard to arbitrations falling under the rules of the Convention, and municipal laws retain full discretion in this respect.¹²⁷ Thus, where there is no serious financial danger, and arbitration has begun before "a well-known international institution", and the arbitrators are to render their award within a short period, the request for interim measures may not be accepted.¹²⁸

b. National Trends

It is established that parties to an arbitration must await, and ultimately abide by, the ruling of the tribunal without recourse to self-help or other acts that might aggravate the dispute or undermine the eventual award. Violation of this principle is recognised by most national legal systems to be a basis for provisional or interim conservatory measures, designed to preserve the rights of the parties, prevent frustration of the award, and keep the peace.¹²⁹ Under most legal systems today a party to a

126. *Ibid.*

127. Luzzatto, *International Commercial Arbitration and the Municipal Law of States*, 157 Hague Recueil (1977-IV) 9, p.48.

128. Pama Industries S.p.A.(Italy) v. Shulz Steel Co.(U.S.) and Banca nazionale del lavoro(Italy), Pretura[Magistrate's Court] of Verona, 22 April 1985, in YCA (1987) 494

129. Sherk Enterprises Akfiengesellschaft v. Societe des Grandes Marques, Corte di Cassazione (Sez. Un.), May 12, 1977, n.3989, in YCA (1979) 286. In the case, the agreement contained an arbitral clause that arbitration was to be held in Zurich under the ICC Rules. Pending the arbitration Scherk requested the President of the Court of First Instance (Tribunale) of Rome for an attachment against SGM. On Feb.2, 1972, the court granted the request. The decision was affirmed by the Supreme Court holding that although the merits of the case to which the

domestic or international arbitration proceeding may petition a national court for provisional relief before, during, and even after the conclusion of the arbitral proceedings.

Interim measures by national courts are considered necessary to ensure that the effectiveness of provisional orders or awards issued by arbitrators should not be undermined. Despite the broad authority granted to arbitrators with respect to interim measures by various arbitration rules, there will always be situations when an effective provisional remedy can only be obtained from a court - either because relief against third parties is desired, the enforcement of a protective order becomes necessary, or the arbitral tribunal has not yet been established.¹³⁰ It has been realized that a variety of reasons speak in favour of interlocutory provisional relief, and today an ever increasing number of jurisdictions recognizes the possibility of arbitral relief as well as domestic court relief during the course of arbitral proceedings.¹³¹

Most modern statutes and international arbitration rules seem to opt for a model of concurrent jurisdiction between the arbitral tribunal and domestic courts.¹³² Art.1022(2) of the Dutch Statute on Arbitration of 1986¹³³, which is to a large extent

attachment related were a matter for the foreign arbitrator, the validation of the attachment was a matter for the Italian court (Art.680, Para.4, CCP).

130. Many US federal courts recognise some equitable power on the part of the district courts to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel. See, *The Sauer-Getriebe* case, 715 F.2d. 348(1983); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d. 43, 47-51 (1st Cir. 1986); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d. 1049, 1052-53 (2d Cir. 1990); *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d. 124, 125 (2d Cir. 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d. 1048 (4th Cir. 1985)
131. *Republic of Iran and others v. Societe's Eurodif and Sofidif and Commsissariat a l'Energie Atomique, France*, Court of Appeal of Paris (First Chamber), 21 April 1982, (65 ILR 912), The Court of Cassation, The Judgement of 14 March 1984(77 ILR 513), The Court of Cassation (Civil Chamber), The Judgement of 20 March 1989, (89 ILR 32); 23 ILM 1063(1984)
132. Art.1051(2) of the Dutch Act of 1986, Art.183(3) of the Swiss PIL, Art.26(3) of the UNCITRAL Arbitration Rules of 1976, Art.13 of LCIA.
133. 26 ILM 921 (1987)

compatible with the Model Law, provides that an arbitration agreement does not preclude a party from requesting a court to grant interim measures of protection or from applying to the President of the District Court for a decision in Summary Proceedings. If, notwithstanding such agreement, an application for urgent injunctive relief is brought before the President in summary court proceedings, the latter has discretionary power to refer the parties back to the summary arbitral proceedings.¹³⁴ As for international arbitration, Art.1074(2) provides that the agreement to arbitrate outside the Netherlands shall not preclude a party from requesting a court in the Netherlands to grant interim measures of protection or from applying to the President of the District Court for a decision in summary proceedings.¹³⁵

In the Swiss Statute on International Arbitration of 1987¹³⁶, in contrast to the Concordat¹³⁷, Art.183 of the Federal Statute provides that provisional remedies, including the freezing of assets, should be referred to the arbitral tribunal itself. As regards provisional orders, the arbitrator's jurisdiction is clearly affirmed, while the judge has only a subsidiary role, upon the arbitrator's request and if a party does not voluntarily comply with those measures.¹³⁸ A useful provision is introduced in Art.183(3), which allows the arbitrator or the judge to request appropriate security before ordering provisional or conservatory measures. Somewhat similarly, Art.184 provides that the arbitrator is to conduct the taking of evidence and that he can, whenever necessary, request the assistance of the judge of the seat (who shall apply his

134. *National Reports*, YCA (1987) 3

135. van den Berg, *et.al.*, *Netherlands Arbitration Law* (1993), p.149.

136. 27 ILM 37(1988)

137. The International Arbitration Convention which is commonly called and referred to as "the Concordat" was established. It became applicable in all Cantons with the only exception of Thurgau and Lucerne. The Canton of Zurich adhered to the Concordat as of July 1, 1985.

138. Gaillard, 'A Foreign View of the New Swiss Law on International Arbitration,'(1988)1 Arb.Int. 25.

own law). In general, Art.185 lays down the duty of the judge (of the seat of the arbitration) to provide any necessary assistance in other situations to the arbitration. This article will apply where the procedural law of the arbitration permits relief to be granted which is available under the law of the seat.¹³⁹

It is evident that the practical realities of interim relief introduce interactions between the arbitral tribunal and the national courts.¹⁴⁰ The concept of concurrent jurisdiction may be based upon the basic goals and policies of the 1958 Convention. The Convention does not compel states to follow any set of actions in this matter, provided that the final resolution - i.e., no interference on the part of the courts with regard to the decision of the dispute - is ensured by municipal rules as applied by contracting parties to the Convention. As in domestic arbitration cases, the courts retain their auxiliary powers in cases falling under the Convention to assist arbitration. By doing so, municipal legal systems remain free to provide for any technical means they may deem preferable in order to make reference to arbitration really effective such as the summoning of an unwilling witness and the ordering of provisional remedies including attachment.¹⁴¹

c. Judicial Provisional Measures and the Model Law

It appears from the construction of international arbitration Conventions that the authority of arbitrators to issue interim measures of protection is not excluded, that a party may have to apply to the courts to issue urgent measures, even if there is an arbitration agreement and that the application must not be seen by itself as a waiver of arbitration on the merits of the dispute.

139. Lalive, 'The New Swiss Law on International Arbitration,' (1988)1 Arb.Int.2, p.13.

140. C.Higgins, 'Interim Measures in Transnational Maritime Arbitration,' (1991) Tul.L.Rev.1519, p.1520.

141. Luzzatto, *op.cit.*, p.38. Art.184(2) of Swiss PIL, Art.27 of Model Law, Art.1041(2) of Dutch Act.

Most national arbitration laws enable the parties to an arbitration agreement to apply to the court for provisional relief without being in conflict with the arbitration agreement or waiving the rights arising therefrom. Although the powers of national courts and arbitral tribunals sometimes duplicate each other, it is generally recognised that these two powers operate to complement each other.

Parties who recognize that the availability of judicial attachments in aid of arbitration may be important in some international transactions, may ensure that the courts have the power to grant such attachments by including a provision to that effect in their contract or by agreeing to arbitration rules which contain such a provision.

Discrepancies in the regulation on the matters out of the relationship between international arbitration and national courts in domestic legislation are likely to generate practices of forum shopping¹⁴² as well as parallel litigation which are detrimental to the development of arbitral proceedings.¹⁴³ To avoid these drawbacks, it seems highly desirable to address the issues on a supranational level. The work of the Model Law, so far, shows that such drawbacks are most likely to be cured on the basis of compromise between participating countries.

Art. 9 of the Model Law was initially modelled on Art. 26 (3) of the UNCITRAL Arbitration Rules. According to Art.26 (3) of the UNCITRAL Arbitration

142. Sometimes the existence of more than one legal system within one state is regarded as adverse to the interests of those who are concerned. But, the different ways in which the Model Law has been treated in the different law districts of the United Kingdom could be seen as an advantage in that a diversity of solutions is offered depending on the location chosen. See, Semple, 'The UNCITRAL Model Law and the United Kingdom,' (1990) JCI Arb. 75, p.97.

143. Most national and international rules allow the arbitrators the priority to determine questions concerning their jurisdiction and to proceed as if no concurrent litigation was pending, subject, however, to the arbitral award later being nullified or ignored. See, French CCP Art.1458(1), 1037 of the Civil Procedure Code of Germany, The 1961 Convention, Arts. V(3) and VI(3), The Model Law, Art.8. In all other situations, the judge and the arbitrator operate without specific directives regarding the conduct of parallel or duplicate proceedings beyond a determination of their respective or concurrent claims to jurisdiction. See, The Art.II(3) of the New York Convention; Reichert, 'Problems with Parallel and Duplicate Proceedings: The Lispendence Principle and International Arbitration,' (1992) Arb.Int. 237.

Rules, the parties are free to seek measures for protection by making a request to the ordinary judicial authority, and such a request shall not be deemed incompatible with the agreement to arbitrate. Art.9 of the Model Law says that such measures can also be sought by a request addressed to the ordinary state court. As a result, a court may be involved not only by lending its executory force to interim measures taken by the arbitral tribunal, but also by taking such a decision in the first place if so requested by a party.¹⁴⁴

The final report of the Commission stressed the fact that the Model Law had never been intended to be a complete code so that any matter not governed by it continued to be governed by the domestic law.¹⁴⁵ For instance, this would have the consequence that questions of the capacity of the parties or of the validity of the arbitration agreement would be governed either by the law chosen by the parties or by the *lex loci arbitri* in the absence of such choice, while questions of arbitrability or public policy would be governed by the *lex loci arbitri*.

Although Art. 9 of the Model Law clearly contemplates interim measures being granted by the court of the place of arbitration, it should not be forgotten that parties to an arbitration in a given Model Law country may seek interim measures of protection from the courts outside of the place of arbitration.¹⁴⁶ If the state where the court was situated had not adopted the Model Law, the attitude of the court towards the application from a Model Law arbitration would be governed by the relevant national law. The request may be treated in the same way as the court treats a similar request from foreign courts. Thus, a state which is bound by bilateral or multilateral treaties to

144. *Delphi Petroleum v. Derin*, (1993) 73 FTR 241 (Can F.C.)

145. It appears that Art.9 of the Model Law does no more than recognise that some domestic legislation will empower the Court to grant interim measures of protection. One is thus thrown back to the domestic law in the relevant state to see whether such power exists. UNCITRAL Report of June 1985, 24 ILM (1985), p.1328.

146. Semple, 'Scotland,' in *Provisional Remedies in International Commercial Arbitration : A Practitioner Handbook* edited by Boch, (1994), 579, p. 597.

execute such requests from courts in other contracting states would also become obliged to execute such requests from arbitral tribunals in those states.¹⁴⁷

The other side of the coin is that the court of a Model Law country may on occasion be approached by a party to an arbitration conducted outwith the place of arbitration.¹⁴⁸ This is a matter which is not “governed by the Model Law”, and also falls to be governed by domestic law of the court before which such measures are requested. In terms of the question whether the court of a Model Law country may exercise the power of interim measures of protection in aid of foreign arbitration, it is important to have regard to Article 1(2) of the Model Law which provides: The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this state. Art.9 of the Model Law merely provides that if the court in a Model Law country possesses such powers by reason of its domestic legislation it is not incompatible with the Model Law for the Court to exercise those powers. The Model Law does not have the effect of enlarging the domestic provisions of a Model Law state.

It is not, however, incompatible with the Model Law for a Model Law state to give to its courts jurisdiction to grant injunctions within that state but in respect of arbitrations being held outside the territory of that state.¹⁴⁹

In the Scottish version of the Model Law, the powers of arbitrators to order interim measures of protection have been modified in two respects.¹⁵⁰ Where the parties

147. Holtzmann and Neuhaus, *op.cit.*, p.740.

148. *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.*, (1994) 113 DLR (4th) 116; 89 BCLR (2d) 132 (BCSC). In the case, the Claimants obtained garnishee funds in a British Columbia court to secure an arbitration claim for demurrage in England.

149. Kaplan, ‘The Model Law in Hong Kong - Two Years On,’ (1992) *Arb.Int.* 223, p.234.

150. Art. 9 of the Model Law has been adapted by the addition of two paragraphs. Art.9(2) gives a non-exhaustive list of “interim measures of protection.”

(a) Arrest or inhibition to ensure that any award which may be made in the arbitral proceedings is not rendered in effectual by the dissipation of assets by another party;

(b) interim interdict or other interim order.

to a foreign arbitration request a Scottish court, they would be bound by any ruling or finding of the arbitral tribunal in terms of Art.9(3).¹⁵¹ In terms of section 27 of the Civil Jurisdiction and Judgments Act 1982 which has given effect to the 1968 European Convention in the United Kingdom, the Court of Session has express power to grant warrant for arrestments, or inhibitions over assets in Scotland and also to grant interim interdict in any case where proceedings have been commenced but not concluded in any EEC member state or elsewhere in the United Kingdom and in relation to any case which is within the scope of the Brussels Convention of 1968.¹⁵² Section 27(3) of the 1982 Act specifically confers a power to create Rules of Court giving the Court of Session the powers conferred by sub-section (1) where court proceedings have been commenced outside the EEC Member States or where the proceedings do not fall within the scope of the Brussels Convention of 1968 or in relation to arbitration proceedings.¹⁵³ The courts in Scotland may have power under Art.9 of the Model Law to grant interim

Art.9(3) provides that where

(a) a party applies to a court for an interim interdict or other interim order; and
 (b) an arbitral tribunal has already ruled on the matter, the court shall treat the ruling or any finding of fact made in the course of the filing as conclusive for the purposes of the application.

151. Davidson, *International Commercial Arbitration -Scotland and the UNCITRAL Model Law* (1991), p.57. By Art.9(3) of the Scottish version of Model Law, the problem shown in *RCI v Bolwell*, 118 ALR 655, in which an interim award of procedural nature was not recognised on public policy reasons, may be resolved.
152. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 Sept. 1968 (the Brussels Convention) (1969) ILM 229, (as amended) (1990) O.J. C189/1. This Convention was extended to EFTA countries by the EC-EFTA ('Lugano') Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of September 16, 1988, (1988) O.J. L319/9, (1989) ILM 620.
153. The Court of Session in Scotland may grant warrant to arrest assets situated in Scotland where proceedings have been commenced elsewhere in the United Kingdom or where they have commenced in another Contracting State to the Brussels Convention under section 27 of the 1982 Act. See, *Clipper Shipping Co. v. San Vicente Partners*, 1989 SLT 204; *Stancroft Securities Ltd. v. McDouvall*, 1990 SLT 746. However, the courts will not grant warrant for arrestment on the dependence if it would not have done so in equivalent Scottish proceedings. See, *West Cumberland Farmers Limited v. Ellon Hinengo Ltd.*, 1988 SLT 294.

interdict on the basis of arbitration proceeding taking place outside Scotland. The Scottish courts would of course be required to have jurisdiction to deal with the action to obtain such measures.¹⁵⁴

In Hong Kong the powers of the courts to assist arbitrators and grant injunctions were set out in s.14 of the Ordinance (Arbitration (Amendment) (No.2) Ordinance 1989) in exactly the same terms as s.12 of the English Arbitration Act of 1950.¹⁵⁵ Since the Arbitration Ordinance is under the head of “Domestic Arbitration”, an amendment to the Ordinance was made to the extent that such of the powers contained in s.14(6) as are compatible with the Model Law, for example, orders for the interim preservation of property and injunctions, should be available in Model Law arbitrations.¹⁵⁶ The amendment came into force on 7 June 1991.¹⁵⁷

154. Semple, *op.cit.*, p.597

155. As far as English law is concerned in relation to the Model Law, Art.9 is consistent with English law, although it is suggested that, contrary to English law, the right of recourse to the Court for interlocutory measures such as pre-trial attachment may be excluded by express agreement. With regard to Art.17 of the Model Law, if the Model Law is applied in England, pursuant to the concluding words of s.12(1) of the 1950 Act, an arbitration tribunal would be able to order by way of interim award the preservation, storage, or sale of goods (eg. perishable goods) which are the subject of the reference provided that the goods are under the contract of one of the parties. If the goods are under the contract of a third party, an appropriate order must be obtained from the court. But, it is doubted whether in the absence of express agreement an English arbitral tribunal has the power to order that security be provided in respect of the interim measures. See Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model law on International Commercial Arbitration*(1989: HMSO), p.55.

156. In *Katran v. Kenven*, YCA (1993) 175, where a dispute arose between the parties and Katran appealed to the Hong Kong High Court, requesting a *Mareva* injunction, the court has no difficulty whatsoever in concluding that ‘an interim measure of protection’ used in Art. 9 is wide enough to cover a *Mareva* injunction. The court based its jurisdiction on the ground that the jurisdiction of the court under the Model Law is identical to the jurisdiction of the court under the Arbitration Ordinance in relation to domestic arbitration being carried out in Hong Kong. As a result, s.14(6) gives the court power for the purpose of and in relation to a reference the same power of making orders in respect of ‘securing the amount in dispute in the reference’ and ‘interim injunction’ as the court has ‘for the purpose of and in relation to an action or matter in the court.’

157. Kaplan, ‘Hong Kong Disputes Solutions,’ (1992) JCI Arb. 2, p.7; The Amendment of 7 June 1991 provides under the rubric, “34E Powers of Court in Relation to Interim Relief” that “Subject to Article 5 of the UNCITRAL Model Law, s.14(4), (5) and (6) applies to arbitrations which are governed by the UNCITRAL Model Law.”

CHAPTER FOUR : ARBITRAL AND JUDICIAL PROVISIONAL MEASURES

I. Arbitral Provisional Measures

A. Difficulty of Definition on Categories

It is generally accepted that an arbitral tribunal is empowered to grant an application for measures conserving the *status quo* until the final decision on merits is rendered which are mainly directed at property or interests, measures preserving or establishing evidence, measures requiring the other party to cease or to perform according to the order of the tribunal, or measures ordering a party to make to any other party or to another person any payment which ought to be made.¹ Arbitration laws and rules do not usually set limits as to the contents of the interim measures to be ordered by the tribunal.

Art.26 (1) of the UNCITRAL Arbitration Rules gives the arbitral tribunal the power to order, upon the request of either party, interim measures, including measures for the conservation of goods.² Art.22 of the American Arbitration Association (AAA) International Rules shares almost the same language with Art.26 of the UNCITRAL Arbitration Rules. Art.34 of the Commercial Arbitration Rules of the AAA grants the arbitrator, in a rather narrow wording, the power to issue such orders 'as may be deemed necessary to safeguard the property which is the subject matter of the arbitration.' The determination of the kind of measure which is best suited for a particular case is left to the procedural discretion of the tribunal.

As far as the parties are concerned, in ordering interim measures of protection, the tribunal is not limited to the particular lists of provisional measures known in the *lex*

1. Art.2.1. of ICC Pre-Arbitral Referee Procedure

2. The UNCITRAL Arbitration Rules, reprinted in (1977) YCA 161, (1976) ILM 701

loci arbitri. For instance, Art.17 of the Model Law provides that the arbitral tribunal has the authority to order such interim measures of protection as the arbitral tribunal deems necessary. Given the multitude of possible cases and the necessity of the measures according to the particularities of each individual case, a strictly systematic approach would be of little use. Instead, some general guidelines may be deduced from the nature of provisional relief and international arbitral practice.

B. Categories and Compensation for Unjust Result

1. Evidence

In the course of an arbitration, an arbitral tribunal is sometimes requested to order one party to produce documents under his control before the tribunal, or permit his adversary to inspect goods, merchandise, or equipment within the former party's control. For instance, the tribunal may use provisional measures as a tool for the preservation of evidence by issuing an order against one party to allow the inspection of a construction site which is the subject matter of the dispute. An order for taking evidence may be necessary for the requesting party to prepare his case before the tribunal by securing evidence which would otherwise be unavailable at a later stage of the proceedings.³

It is the tribunal's duty to consider and grant the request for taking evidence if considered appropriate. However, the tribunal has no power to order such documents to be produced, or to appoint an independent expert to take evidence. In circumstances in which the party in control of a given construction site or in possession of materials with evidentiary value in question refuses to comply with the tribunal's order, the arbitrators would be justified in drawing adverse inferences from the non-compliance and accepting as correct the facts alleged by the party refused the right of access.

3. Note, 'Deficiencies in Current International Arbitration Practice in Construction Cases,' (1991) Arb.Int. 149, pp.150-151.

Otherwise, there is no other way but to resort to the coercive power of the court of competent jurisdiction.

2. Prevention of Sale of Goods

It is well established in the practice of international arbitration as well as in national practice that an arbitral tribunal is empowered to make an order for sale of perishable goods or an order to halt the sale of disputed goods, or deposit of goods with a third person.⁴

3. Injunction for Payment into Escrow Account

In large construction projects, the arbitrators may order the parties to make provisional payments into a supervised escrow account, thereby allowing expenditures to be made to maintain the project pending resolution of the dispute.

In a construction contract where instalment payments on the construction price were to be made by negotiable promissory notes, there arose disputes about the performance of the contract. Although the employer stopped payment of the promissory notes and the contractors threatened to cease all work, both parties wanted the project completed. In the ensuing arbitration, the arbitral tribunal ordered the employer to pay the promissory notes into an escrow account controlled by the arbitral tribunal.⁵ Similarly, in an arbitration involving disputes out of a reinsurance pool, the tribunal issued an Interim Final Order (IFO) setting up an escrow account with the balances apparently due between the parties.⁶

Such power will be effectively exercised to recover sums allegedly due under the agreement in an arbitration where a contractor claimed against an employer for

4. Art.26(1) of UNCITRAL Rules

5. Craig, *et.al.*, *International Chamber of Commerce Arbitration*(1990), p.417.

6. Pacific Reinsurance v. Ohio Reinsuracne, 935 F.2d. 1019 (9th Cir. 1991)

breaching the contract. In other ways, the respondent may be obliged to open a banker's credit so as to provide a bank guarantee for the sum in dispute in favour of the claimant, which the claimant may call in if he wins the case.

4. Restraint of Calling of a Guarantee

The tribunal can authorise one party to call in a guarantee provided by the other party. Since any provisional measure is limited to the direct relationship between the parties, the tribunal may not order the bank to refrain from any payment in case where the guarantee is called in. In these circumstances, one of the parties may be ordered not to call a performance guarantee 'on first demand' which has been opened by the other party.⁷

In an arbitration between a French contractor and an Iranian employer, the Iranian party sought to make a call under a performance guarantee given by a banking syndicate pursuant to the French party's contractual obligations. The French party requested interim relief from the arbitral tribunal so as to make the bank suspend the call until a decision was reached on the merits of the dispute. Although it declined the application directed to the bank, the tribunal made a proposal in a partial award that in order to preserve the *status quo*, the defendant renounce its call under the guarantees until the arbitral proceedings on the merits of the underlying contract were concluded.⁸

5. Trade Secret or Proprietary Information

The tribunal may order a party to refrain from any publicity relating to the subject matter of a dispute which may have significance for the protection of trade secrets and proprietary information.⁹ Publicity involving trade secrets may extend to the

7. Sperry Int. Trade Inc. v. Government of Israel, 689 F.2d. 301 (2nd Cir. 1982)

8. ICC Award Case No. 3896/1982, YCA X(1985)

9. Holzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*(1989), p.344.

issues of political and economic policy, and possibly even national security. This is the reason why arbitration is preferred to litigation when a state is involved.

The rule of confidentiality in arbitrations, however, is not as reliable as it is commonly thought to be.¹⁰ In *Amco v. Indonesia*¹¹, Indonesia requested before an ICSID Tribunal to make a provisional measure so as to prevent *Amco* from doing a large press campaign in a newspaper in Hong Kong which was alleged to discourage foreign investment in Indonesia. In issuing an interim award, the Tribunal rejected the request on grounds that the article published in the "Business Standard" could not have done any actual harm to Indonesia, nor aggravate or exacerbate the legal dispute put before the Tribunal, and that the ICSID Convention and the Rules do not prevent the parties from revealing their case. Similarly, contrary to their counterparts in England, the courts in Australia would not accept confidentiality in implied terms.¹²

6. Attachment

Sometimes, the claimant will be confronted with efforts by the defendant to bring the property of the dispute or other assets which become the subject matter for potential enforcement efforts of the claimant into jurisdictions in which enforcement is less easy. As a result, by the time the award is rendered, the assets of the debtor may well have dissipated from the jurisdiction where the award could be enforced under the New York Convention. Likewise, assets have frequently been transferred to a third party before the arbitration is completed. Since the power of the arbitral tribunal is

10. Rawding, 'Protecting Investments Under State Contracts : Some Legal and Ethical Issues,' (1995) *Arb.Int.* Vol.11, No.4, 341, p.343.

11. *AMCO Asia Corp. v. Indonesia*, ICSID Arbitral Tribunal : Decision on Request for Provisional Measures, ICSID Award of December 9, 1983, (1985) ILM 365, YCA (1986) 159.

12. *Esso Australia Resources Ltd. v. Minister for Energy and Minerals*, (1995) 128 ALR 391; *Oxford Shipping Company Ltd. v. Nippon Yusen Kaisha (The Eastern Saga)* [1984]3 All ER 835; *Hassneh Insurance Company of Israel v. Stuart Mew* [1993]2 Lloyd's Rep. 243; Sheridan, 'Private and Confidential : a Benefit of Arbitration?' (1996)12 *Const.L.J.*No.2 74.

inherently restricted to the parties, the tribunal may not issue a writ of attachment to prevent these tactics, which, as a 'coercive' remedy, infringes upon the rights of the party and is thus reserved for the competence of the municipal courts and enforcement organs. In most jurisdictions, detailed provisions may be found in relation to such situations. Those provisions are worthy of careful attention whenever an effective enforcement is considered.

7. Compensation for Unjust Result

Actions to preserve the *status quo* involve a balancing of the interests of the parties, since an order by a tribunal to a party to refrain from exercising an alleged contractual right prior to a final decision on the merits may prejudice that party. If a party is ordered not to exercise its claimed right to end a contract and if the award ultimately confirms that the party had the right to terminate at an earlier date, prejudice may have been caused by having prevented such a party from immediately negotiating another contract. In terms of balancing the relationships between the parties, there need to be some measures for preventing unjust results taking place.

It is well established that a party seeking an interlocutory or a *Mareva* injunction before the courts in England is required to give a cross-undertaking in damages as a condition of being granted the order sought. Equally settled is the principle that the undertaking in damages may be invoked in two situations. First, when the injunction is discharged before trial on the ground that it should never have been granted and, secondly, if at the end of the trial the party enjoined obtains a favourable judgment vindicating his claims in the action.¹³

As in the case of ordinary court proceedings, the party to whom the provisional measures are addressed has a claim for damages against the other party if the

13. Zuckerman, 'The Undertaking in Damages-Substantive and Procedural Dimensions,' [1994] CLJ 546; Practice and Procedure, 'Enforcement of Cross- Undertaking in Damages,' (1995) 14 CJQ 85.

provisional relief turns out to be unjustified and the tribunal may decide on this claim in the same arbitration, since it has jurisdiction to do so. In appropriate cases, an arbitral tribunal may grant an application for interim measures of protection subject to the condition that the corresponding performance of the other party is likewise respected, particularly if such performance involves the payment of money or advancing security.

The arbitral tribunal may always require appropriate security from the party applying for provisional relief. The costs to be covered by the security include the actual costs of an interim measure ordered and any foreseeable damage suffered by the other party. The tribunal in accordance with Art.26 of the UNCITRAL Arbitration Rules may require security for the costs of such measures. Similarly, under Art.13.1(h) of the London Court of International Arbitration (LCIA) Rules, the arbitral tribunal has the power to order the preservation, storage, sale or other disposal of any property or thing under the control of any party. Security may be requested pursuant to Art.15.4. of LCIA Rules.

C. Forms

1. Inherent Restriction

Since it derives from the agreement between the parties, the power of the tribunal to grant an application for interim measures of protection is restricted to those measures which have *inter partes* effect. Naturally, such measures have to be made 'in respect of' or in close connection with the subject matter of the dispute.

For the proper exercise of the wide discretionary authority given to the tribunal, the tribunal must consider how the interim measures of protection should be formed. The tribunal must also determine whether there is any impediment to the granting of a particular kind of award by laws in force at the seat of arbitration.

2. Recommendation or Proposal

The contractual nature of the arbitration agreement inevitably entitles arbitrators to issue interim measures of protection addressed only to the parties to the agreement and not to a third party. The tribunal grants interim measures of protection in the form of a proposal or recommendation addressed to both parties which is contained in an interim award disposing of other issues or a partial award.¹⁴

Recommendations or proposals may prove useful in some jurisdictions where only the courts have the power of granting interim measures of protection, or where the tribunal considers other forms as inappropriate.¹⁵ Unlike an enforceable award, a recommendation or proposal cannot be enforced, in any case, and is simply a moral reminder in the sense that it places the party which does not comply with it in a negative light, even if this does not mean that the claims of that party regarding other aspects of the dispute will be disregarded.

3. Order or Award

When interim measures of protection need a coercive form, such measures are made in an order or award rather than a mere recommendation or proposal. A mere recommendation to a party to allow its assets to be attached, or to deliver some assets to a custodian, does not seem realistic. That measure must necessarily be such as to be enforceable coercively.¹⁶

Arbitrators have power to make an order for interlocutory equitable relief that is necessary to prevent a potential final award from being meaningless. The order to make an interim payment of a part of the claim is not far from being a protective

14. ICC Award No. 3540/1980, Jarvin and Derains, *Collection of ICC Arbitral Awards*, 1990.

15. Lalive, 'The First 'World Bank' Arbitration (Holiday Inns v. Morocco) - Some Legal Problems,' (1980) 51 BYIL 123

16. Rubino-Sammartano, *International Arbitration Law*(1990), para.17.3.

measure in terms of effect on the relevant party.¹⁷ An order of an interlocutory and procedural nature may be named as an award. It is generally accepted that an arbitrator is authorised not only to issue final awards resolving the entire reference before him, but also to produce interim or part (partial) awards that order interim measures of protection and sever easily resolved substantive claims from those requiring extensive consideration, but in some countries he must be expressly empowered to do so. Art.26 (2) of the UNCITRAL Arbitration Rules provides that interim measures may be established in the form of an interim award.

Orders of interim relief in ICC arbitration do, as a practical matter, often take the form of, or are incorporated in, interim or partial awards.¹⁸ It may be remarked here that an interim award with *res judicata* effects may be critical.¹⁹ In an ICC case where an ICC arbitration was to take place in Geneva, the procedure being subject to the law of the Canton of Geneva, the question arose whether the issue on provisional remedies was to form a partial award. The tribunal considered that under the Swiss Concordat on Arbitration the issuance of partial awards was possible, unless the parties had otherwise agreed, and that neither the ICC rules, nor the contract or the Terms of Reference of the arbitration had excluded this possibility. The tribunal decided, finally, as to the form, that claims which sought preliminary pronouncement of an award on certain points of claim could be admitted in the case.²⁰

There is nothing in the Model Law that would appear to preclude this.²¹ In an

17. The *Pacific Reinsurance* case, 935 F.2d. 1019 (9th Cir. 1991)

18. The rendering of a partial award may under appropriate circumstances advance the conduct of the proceedings by narrowing the issues, without depriving the parties of the right in due course to prepare evidence and argument on all matters that are relevant. See, ICC Awards 3267/1984, 5073/1986.

19. According to Art.1051(3) of the Dutch Act, an award of interim nature has *res judicata* effect.

20. ICC Award 3540/1980

21. It is suggested for the preparing the enactment of the Model Law that the distinction between the three types of award was that under interlocutory awards "the tribunal ruled on such preliminary matters as jurisdiction, or the finding of liability," while under partial awards

appropriate case an arbitrator will swiftly make an interim award or indeed a full and final award upon the claimant showing that there is no real defence or answer to his claim or part thereof.²² But, one cannot state with certainty that the Model Law actually empowers a tribunal to render such awards, and if it does not, then this as a matter not governed by the Model Law falls to be governed by domestic law.

In accordance with Art.21 of the rules of ICC, a partial award, like a final award, must be forwarded to the Court of Arbitration for its scrutiny and will be notified to the parties by the Secretariat only after all formalities of an award have been complied with. An interim decision, however, is a procedural matter and will not be subject to examination by the Court. It may be evidenced by simple orders or minutes of the tribunal. Many decisions of an interim nature may be made by an arbitral tribunal without an award even though they might affect the outcome of the case.

The unique system for scrutiny of awards in ICC arbitrations may turn into a stumbling block in enhancing efficiency of arbitration under the ICC regime. When a decision is named an “award”, it may take several weeks before the award gets through the scrutiny procedure. To overcome such delay, the parties may agree to honour a decision in the form of an order. But where relations between the parties are poor, it may not be possible to achieve this kind of cooperation.

Generally, when arbitrators are requested to render a partial award, they must consider whether it will be more efficient to render a partial award or an interim award, requiring review by the Court of Arbitration under the ICC regime, or to render only a single final award. In an ICC arbitration sitting in Switzerland, the tribunal made a decision on matters regarding a time limit. Without putting the decision into an award which would have to be scrutinized by the Court of Arbitration, the tribunal included

“damages were awarded on one part of a claim but other issues remained to be decided.”
Finally, “the interim award referred to an award on such matters as interim measures of relief”.

22. *Guandong Agriculture v. Conagra International*, YCA (1993) 187, p.107.

such decision in a later final award. The aggrieved party challenged the final award before a Swiss court. The Swiss court set aside the award on the ground that the arbitrators were wrong in determining the point where the time limit agreed to between the parties had expired in regard to the commencement of arbitration.²³

In fact, most national laws and international Conventions do not choose to define the term “award”.²⁴ Even under the Model Law, although there was considerable discussion of the point, no definition of the term “award” was arrived at. It seems that a strict definition of each kind of “award” is of little use, since arbitrators do not consistently distinguish among partial, interim and interlocutory awards. The Iran-US Claims Tribunal sometimes called an “interlocutory award” what might just as easily have been called a partial award, such as an award resolving claims but not counterclaims or declaring that a taking had occurred. The tribunal also labelled as “interlocutory” awards granting interim relief.²⁵ These attitudes have advantages in giving the arbitrators freedom to the maximum in matters of case management and thereby enhancing the efficiency of the arbitral process. Therefore, it does not really matter what the arbitrators call a particular award.²⁶

23. Friedland, ‘The Swiss Supreme Court Sets Aside an ICC Award,’ (1996)13 J.Int.Arb.1, 111.

24. The phrase, ‘interim award’ in Scotland is sometimes used loosely, even by judges, to refer to or include part awards. See, *Lyle v. Falconer* (1842) 5 D 236. The scope of ‘interim’ award in Scotland may be different from that in England. R. L. C. Hunter, *The Law of Arbitration in Scotland* (1987), para. 15.14.

25. Baker & Davies, *The UNCITRAL Arbitration Rules in Practice - The Experience of the Iran-United States Claims Tribunal* (1992), p. 165.

26. *Ibid.*, p.163.

D. Summary Proceedings and Interim Payment

1. Generally

It may happen, particularly in construction arbitrations that there is a sum incontestably due to one of the parties while the other party alleges the existence of the right of set-off or counterclaim. This may happen in three cases. Firstly, there may be circumstances in which the sums are not disputed between the parties. Secondly, the parties may dispute a portion of the sums claimed, while the rest of the sums are incontestable. Thirdly, there are very poor defences to the sums claimed. The first two of these cases do not seem complicated. Where the parties do not dispute the total amount of the sums claimed, they can be easily taken into account to decide which party is owed by the other party. Where there are disputes as to the amount of the sums claimed to be due, the undisputed portion of the sums would be considered as the provisional amount payable.

The arbitrator may be in difficulty in the third circumstance where there is a very poor defence or no answer to the claim. The arbitrator may be requested to decide the matter of interim payment as would be done in summary proceedings in an ordinary court action. It is, however, established that the arbitrator has no power to award the amount claimed, nor, indeed, should he publish an interim award for what he believes is an incontestable amount, unless he has held a preliminary hearing to deal with it in the usual way. As a result, the arbitrator will have to give no favour to one of the parties lest his award, after lengthy proceedings, should be set aside for misconduct.²⁷

2. Interim Award in Summary Proceedings

In most jurisdictions, the arbitrator does not have inherent power to decide an urgent matter summarily. It is the parties who authorise the tribunal to make summary

27. Mustill and Boyd, *Commercial Arbitration* (1989), p.493.

awards. Under the new English Arbitration Act, the parties to an arbitration taking place in England may empower the tribunal to order on a provisional basis matters for the payment of money or the disposition of property, or to make an interim payment.²⁸

In accordance with Art.1051 of the Dutch Act, the parties to an arbitration sitting in the Netherlands may agree to summary proceedings leading to a summary award.²⁹ It is also provided in that article that in summary arbitral proceedings not the entire tribunal but only its chairman renders an award. Such arbitral awards are deemed final at least in the Netherlands in accordance with Art.1051(3) of the Dutch Act. In spite of its *res judicata* effect, however, this 'award' contains only a decision of a provisional nature, without disposing of even parts of the dispute on the merits as in the case of partial or final awards. An award made in summary proceedings in accordance with Art.1051(3) of the Dutch Act loses its *res judicata* effect if the tribunal renders a contrary decision in the final award.

3. Interim Payment

It is not difficult to imagine that a construction project would be most likely to stop if major disputes were left unresolved for a long time. In a complex arbitration, partial awards are useful in resolving disputes which are separate from each other. Such a partial award mechanism may permit the injured party to recover damages immediately following hearings of evidence and agreement on each of the sub-disputes. In this way, an amount of cash flow may be maintained for the current project.

As with partial awards, a reason for requesting an interim award is to provide a ruling with respect to clear obligations and to furnish a title upon which subsequent execution may be granted prior to resolution of other issues which may require lengthy proceedings.

28. Section 39 of the Arbitration Bill of England

29. Tebbens, 'A Facelift for Dutch Arbitration Law,' (1987) NILR 141.

The tribunal may enter an interim award in favour of a defendant or counterclaimant for the fixed sum due to it, but at the same time decide that the adversary has the right to set-off against the interim award any damages to which it may eventually be held entitled. The possibility of obtaining interim payment of fixed sums, due and payable in advance of a final award, was dealt with in an ICC arbitration taking place in Geneva between a French corporate claimant and a Yugoslav enterprise acting as its subcontractor.³⁰ The tribunal made an interim award ordering interim payment upon the claimant giving adequate security, with damages between the parties to be fixed definitively in the final award. Until the final award was made, the claimant's right of set-off was protected by requiring the provision of security, equal to any sum paid under the interim award.

When interim measures of protection are sought for obtaining security for the payment of expenses or other sums which may be found due under an award, these measures may be contained in an interim award in Scotland. An interim award in Scots law is an award which determines the issues mentioned therein only provisionally, not conclusively and finally, and may eventually be subsequently recalled, modified and altered.³¹ It is recognised in Scotland that arbiters are not granted any such powers by legislation.³² On the contrary, the arbitrator in England, assuming he deemed it appropriate, could make an interim award for a sum if there were some points of counterclaim, which, if found against the claimant, could result in the eventual sum awarded to the claimant being reduced.³³ The English arbitrator could make an interim

30. ICC Case 3540/1980, VII YCA 124(1982)

31. *Edinburgh & Glasgow Railway Co. v. Hill* (1840) 2 D 486

32. *Taylor Woodrow Construction (Scotland) Ltd. v. Sears Investment Trust Ltd.*, 1992 SLT 609. Clause 23 of Arbitration (Scotland) Bill, however, provides that "unless the parties otherwise agree, an arbitral tribunal may make an interim or part award."

33. Section 14 of the 1950 Arbitration Act, *Sethia Lines Limited v. Naviagro Maritime Corporation*, *The Kostas Melas* [1981]1 Lloyd's Rep. 18, *Japan Line Ltd v. Aggeliki Charas Compania Maritima S.A. and Davies and Potter, The Angellic Grace* [1980]1 Lloyd's Rep. 288;

award for an amount of money comfortably within a sum which he is confident he will ultimately award to the claimant.

Although ICC arbitrators have the inherent power to make interim measures of protection relevant to the arbitration and addressed to the parties, their power does not extend to giving directions to third parties, nor do their orders to the parties have binding force. In an international construction arbitration, the American contractor who had opened a letter of credit to guarantee performance of its contract with the Government of Israel failed to prevent the employer from calling upon the issuing bank to pay the letter of credit representing an unconditional guarantee. The contractor then obtained an interim award requiring the Government of Israel to pay the proceeds of the letter of credit into an escrow account owned by the two parties and to be disposed of either by agreement of the parties or by an award of the arbitral tribunal; failing either of these solutions, the matter was to be dealt with by order of a US court having jurisdiction. The interim award containing interim measures of protection served primarily as a security device for a final award on the merits. The award was found to be a final, albeit partial, award and was enforced under the New York convention.³⁴

Exmar B V v. National Iranian Tanker Co, (The "Trade Fortitude"), [1992]1 Lloyd's Rep. 169.

34. *Sperry v. Israel*, 689 F.2d. 301 (2nd Cir. 1982); In *Southern Seas Navigation v. Petroleos Mexicanos*, SMA, Interim Award 2015/1985, in YCA (1986), Southern Seas Navigation Limited (hereinafter owner) chartered *The Messiahaki* Floga to Petroleos Mexicanos (hereinafter charterer) on the Texacotime form of time charter. Charterer filed "notice of lien" (also called "notice of claim") on the vessel with the Liberian Registry of ships in order to obtain security for its claim. Owner commenced arbitration with charterer because the conveyance was being held up by charterer's notice of lien, and requested an order requiring charterer to rescind the notice of lien. The issue before the arbitral panel was whether the relief requested by owner was appropriate and within its authority to grant. The arbitrators held that Owner was entitled to have the notice of claim against the vessel reduced to the amount of its claim for a refund of hire. After receiving the award, Owner filed a petition in the U.S. District Court, Southern District of New York, for confirmation of the award. The crucial issue before the court was whether the award was "final" or not. The court held that such an award, although it was labelled as "interim", was not "interim" in the sense of being an "intermediate" step toward a further end. Rather, it was an end in itself, for its very purpose was to clarify the parties' rights in the "interim" period pending a final decision on the merits. See, *Southern Seas Navigation Ltd. v. Petroleos Mexicanos*, U.S. District Court, Southern

E. Enforcement

Interim measures of protection in an interim or partial award as well as in a procedural order or recommendation are not generally enforceable.³⁵ Disobedience of an interim or interlocutory order carries with it no immediate legal sanction for the recalcitrant party. In the absence of a particular provision of national law, the courts at the seat of arbitration are not empowered to sanction non-compliance with arbitrators' interlocutory orders either.³⁶ Nevertheless, parties do almost always comply with interlocutory orders of the arbitral tribunal since failure to do so is likely to be interpreted as an act of bad faith and influence the decision on the merits.

On the one hand, interim order or award may be treated as a final award which is enforceable. In the United States, an Interim Final Order for an order of payment into an escrow account which never touched on the reference on the merits was confirmed and enforced as a final award.³⁷ Under the Dutch Act and the Scottish version of the Model Law, an order of interim measures may be treated as an interim award which may be reviewed or enforced in the same way as a final award.³⁸

On the other hand, since an award must finally dispose of one or more disputes between the parties, an award which addresses only procedural matters may not be enforceable.³⁹ In accordance with the *lex loci arbitri*, the interim measures of protection

District of New York, 25 April 1985, 606 F.Supp. 692, in YCA (1986) 210.

35. Art. 17 Model Law and Art. 183 (1) of the Swiss PIL

36. While under most arbitration laws, arbitrators may not impose a penalty for non-compliance, Art.1056 of the Dutch law allows the arbitrators to impose a penalty for non-compliance, provided they are dealing with an order for an action or omission and not for the payment of a sum of money.

37. The *Pacific Reinsurance* case, 935 F.2d. 1019 (9th Cir. 1991)

38. Art.1051 of the Dutch Act, Art.17 of the Scottish version of the Model Law. See also *Recent Developments in Arbitration Law and Practice*, YCA XVII(1992), p.461.

39. *Resort Condominiums v Bolwell*, 118 ALR 655.

may not be given *exequatur* if the party concerned does not voluntarily comply with these measures. Even though an award of an interim or provisional nature was turned from an enforceable award into a judgment in the Netherlands or Scotland, such a judgment on an interim or provisional award would not be enforceable in other countries contracting to the Brussels Convention of 1968. The Brussels Convention excludes in its entirety arbitration whose enforcement is the main subject of the New York Convention.⁴⁰

In light of the enforcement of an award made abroad, the question arises whether the New York Convention should extend to awards of a procedural nature, which are interlocutory in character and which can be subsequently varied by the arbitrator.⁴¹ Since the New York Convention is based on the assumption that an enforceable award contains a decision which may no longer be revised by the tribunal within the arbitral proceedings, an interim award containing an interim measure of protection is not 'binding' as required in Art.V(1)(e) of the Convention. Since there is still the possibility of a reverse decision being taken by the arbitrators, the award cannot readily be enforced under the New York Convention. An interpretation has been made by the Dutch legislature as to the word 'binding' in Art.V(1)(e) of the New York Convention. In accordance with Art.1076(1)(A)(d), an interim award in terms of interim measures of protection is likely to be refused enforcement since the award is still open to an appeal to a second arbitral tribunal or to a court in the country in which the award was made.

Art.17(2) of the Scottish version of the Model Law makes it clear that interim orders of protection be treated as effectively an interim award which is subject to recognition and enforcement or refusal thereof as provided in Arts. 35 and 36 of the

40. Art.1(1)(iv) of the 1968 Brussels Convention. *Marc Rich v. Impianti*, [1992]1 Lloyd's Rep. 342 ; *ABCI v. BFT* [1996]1 Lloyd's Rep. 485, p.489.

41. Pryles, 'Interlocutory Orders and Convention Awards : the Case of Resort Condominiums v. Bolwell,' (1994) 10 Arb.Int. 385.

Model Law.⁴² Even with this express legislation, its effect is considered “dubious” about the type of order which would be enforceable under Art.17(1).⁴³ As is shown in the Dutch legislation, the Scottish enactment reveals that interim orders treated as an interim award in accordance with Art.17(2) of the Model Law may only be enforceable in the territory of Scotland in pursuance to Art.1(2) of the Model Law.⁴⁴

F. ICSID Tribunal

1. ICSID Convention

a. Purposes

The Convention on the Settlement of Investment Disputes between States and Nationals of other States (“The Convention”) was concluded at Washington, 18 March 1965 by which the International Centre for Settlement of Investment Disputes (“The Centre”) was established under the auspices of the International Bank for Reconstruction and Development.⁴⁵ The purpose of the Convention was to set up mechanisms that would be widely accepted for conciliation and arbitration purposes, and to which Contracting States and nationals of other Contracting States can submit disputes on matters of international private investments, rather than to local jurisdictions.⁴⁶

b. Objection to Jurisdiction of the Tribunal

Since the arbitral tribunal under the Convention (“The Tribunal”) bases its

42. *Recent Developments in Arbitration Law and Practice*, YCA XVII(1992), p.461.

43. Davidson, *International Commercial Arbitration -Scotland and the UNCITRAL Model Law* (1991), para.5.15.

44. Berger, *International Economic Arbitration* (1993), p.346.

45. ICSID Convention Article 1(1).

46. *Attorney-General v Mobil Oil NZ Ltd*, [1989]2 NZLR 649

jurisdiction on the parties' consent in writing to refer their disputes to the Centre, the state party to the dispute is subject to the Convention.⁴⁷ Although a state party to a dispute raised before the Tribunal may refuse to participate in any arbitral proceedings under the Convention by denying the existence of any consent to refer the dispute to the Tribunal in accordance with its national law, it is established that the state is not allowed to base its objection to the jurisdiction of the Centre or to the competence of the Tribunal on the ground that there is no consent by national standards.⁴⁸

As in many international arbitrations but for rather different reasons, an important practical problem for the arbitrations under the Convention is that of provisional measures or interim measures of protection. While municipal courts may readily dismiss requests for other forms of relief on the ground that to grant that would usurp the power of the Tribunals to determine disputes submitted to the Centre (unless, of course, the Tribunal or the parties' agreement authorised a party to seek such relief), in the area of conservatory relief the applicant may forcefully contend that municipal court assistance promotes rather than frustrates the basic purpose of the Convention by ensuring enforcement of its awards.

The magnitude and complexity of most international disputes, involving inescapably long periods of time before any decision or amicable settlement can be reached, give the question of provisional measures before the Tribunal considerable significance.⁴⁹ This is evident in cases where a sovereign state participates as in ICSID

47. The ICSID Convention Article 25(1). Shihata & Parra, 'Applicable Substantive Law in Disputes Between States and Private Foreign Parties : The Case of Arbitration under the ICSID Convention,' (1995)9 ICSID Rev.- FILJ 183, p.185; Nathan, 'Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention,' (1995)12 J.Int.Arb.27, p.28.

48. In *The Pyramids* case, 22 ILM 752, basing itself on the ground that a Contracting State's interpretation of its own legislation was not able to control the Tribunal's decision as to its own competence, the Tribunal rejected the submission for the Egyptian Government that there was no consent to the Centre's jurisdiction since there was no contract under Egyptian law.

49. In *Atlantic Triton*, 24 ILM (1985), both parties requested guarantees at the outset of the proceedings in the context of requests for interim relief. The requests for guarantee arose at

arbitration.

c. Scope of Power for Provisional Measures

Generally, Art.47 of the Convention provides for the power of the Tribunal to recommend provisional measures. Pursuant to Art.47 of the Convention, the Tribunal “may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

The language of Art.47 suggests that the only factors relevant in determining whether to recommend provisional measures are (i) whether either party has some right (ii) which circumstances require to be protected through the recommendation of provisional measures.⁵⁰ Art.47 of the Convention authorises ICSID Tribunals to do no more than recommend, as opposed to prescribe, provisional measures. At an early stage of the legislative history of the Convention the Tribunal was authorized to ‘order’ provisional measures.⁵¹ This raised the question of enforcement. The final text avoids

the outset of the proceedings and were not necessitated by the circumstances of the case. In *Amco*, (1985) ILM 365, security was sought in the context of annulment proceedings under Article 52 of the Convention. The request arose in response to an application for a stay of enforcement that accompanied an application for annulment under Art. 52, and the Committee in the case set an important precedent for ICSID annulment proceedings, by balancing the applicant’s need to be protected from irrevocable enforcement before the annulment application was decided and the right of the party that had already prevailed on the merits, and who was faced with additional proceedings, to be assured that the applicant for annulment would be obliged to respect the award should it be affirmed (in exchange for the requested stay of enforcement).

50. In *AMCO Asia Corp. v. Indonesia*, (1985) ILM 365, the Republic of Indonesia filed with Tribunal a Request for Recommendation of Provisional Measures for the purpose of preventing *AMCO* from taking action of any kind which might aggravate or extend the dispute submitted to the Tribunal, and in particular from permitting, stimulating, or instigating the publication of propaganda presenting their case outside the Tribunal or otherwise calculated to discourage foreign investment in Indonesia by an Article published on the front page of a Hong Kong news paper, *The Business Standard*, on June 27, 1983. The Tribunal found, however, that the article published in *The Business Standard* could not have done any actual harm to Indonesia, nor aggravate or exacerbate the legal dispute put before the Tribunal. By this decision, in order to justify provisional measures on the ground of aggravation of that underlying dispute, the conduct at issue must be much more than merely annoying.

51. Caron, ‘Interim Measures of Protection : Theory and Practice in the Light of the Iran-United

that issue by limiting the Tribunal to the issuance of recommendations. Non-compliance by a party with a recommendation by the Tribunal is, however, likely to be taken into account by it in its deliberations and award.⁵² Rule 39(1) of ICSID's Rules of Procedure for Arbitration Proceedings (the Arbitration Rules), implementing the very general provision of Art. 47 of the Convention, requires the party which selects a provisional measure to specify the rights that such a measure would purportedly preserve. Rule 39(3) of the Arbitration Rules, just like Art.41 of the Statute of the International Court of Justice (ICJ), allows the tribunal to issue relief on their own initiative. Such relief is not limited to measures requested by the parties.

Art.26 of the Convention, however, provides that consent to arbitration under the Convention shall, unless otherwise stated, be deemed consent to such arbitration "to the exclusion of any other remedy." The ICSID's jurisdictional exclusivity appears to be reinforced by Art.64 of the Convention.⁵³ It would seem, therefore, that municipal courts, when seized of a claim arising out of an agreement providing for ICSID arbitration, should refrain from adjudication. This has been referred to as a rule of judicial abstention or as the exclusivity principle.

The Tribunal often faces the question to what extent it has power to recommend provisional measures to protect such exclusivity and prudential considerations as to the exercise of such power.⁵⁴ Sometimes, national courts themselves have been called on to rule on matters arguably affecting ICSID jurisdiction and to pronounce implicitly or

States Claims Tribunal,' (1986) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 465, p.478.

52. *Explanatory Notes and Survey on the 1965 Convention*, YCA (1993) 677.

53. Art.64 of the 1965 Convention reads in relevant part as follows : " Any dispute ... which is not settled ... shall be referred to the International Court of Justice"

54. Art.47 of the Convention and Rule 39 of ICSID's Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) in force from Jan. 1, 1968 to Sept. 26, 1984 (the 1968 Rules) do not, on their face, exclude recourse to other fora for provisional (or conservatory) relief.

explicitly on the scope and extent of ICSID jurisdictional exclusivity.

In a complex situation where national courts are involved with provisional remedies requested before the Tribunal, as regards the request of provisional measures under Art.47 of the Convention, the Tribunal has to establish its powers in the face of jurisdictional objections to recommend provisional measures prior to the Tribunal's definitive establishment of its jurisdiction, and decide the extent of the jurisdictional exclusivity of an ICSID Tribunal. Several times, the Tribunals have been requested to act, under Art.47 of the Convention, to recommend provisional measures to protect their jurisdictional exclusivity when it was threatened to some extent by municipal proceedings.

While the Tribunal is competent to rule upon investment disputes which the parties participating in an investment have consented to submit to the Centre's jurisdiction, it is arguable whether an extra-conventional request for interim relief following upon an investment dispute constitutes one part of such dispute. If it is, one may further conclude that because such a request violates the Convention by which the parties have committed themselves to resolve their dispute, the request constitutes a breach of the arbitration agreement for which contract damages should be available.

2. Principles of Exclusivity

a. Generally

It is well settled in international law that parties should refrain from any measure which might have a prejudicial effect on enforcement of eventual decision; and that they should not, in general, do anything, of whatever nature, which might tend to aggravate or magnify the dispute. In many cases a party involved in arbitral proceedings is in legitimate need of provisional measures. Depending upon the circumstances, the parties may request either the arbitral tribunal or domestic courts to order such measures. This option is acknowledged in arbitration rules, such as those of

the ICC, and the UNCITRAL Rules, and has been given effect in judicial decisions.

The question whether the Convention and the Arbitration Rules form an exception with respect to all other arbitration rules is very delicate. That is more evident, when the question is actually submitted to a court of a Contracting State and will certainly be submitted to other national courts and arbitral tribunals. The reason is that the term “arbitration” in the phrase “arbitration under this Convention” in Art.26 of the Convention is not defined and thus a question could arise as to the exclusivity of the Centre’s jurisdiction as regards incidents or ancillary aspects of arbitration not clearly or completely covered by provisions of the Convention.⁵⁵

Generally, the “remedy” in Art.26 of the Convention is understood to refer to the means by which a right is enforced or the violation of a right is prevented, redressed or compensated. Serious and conflicting decisions have been made on the meaning of “remedy” in different courts. The language of Art.26 would appear to advance a rather unmistakable rule of exclusivity extending to any kind of remedy, provisional or otherwise. It is understood that the occasional need for provisional conservatory measures and the frequent potential for abuse tilt in favour of exclusivity a balance reflected in the clear language of Art.26.⁵⁶

According to the exclusivity principle, the capacity of domestic jurisdictions to hear requests for interim measures could result in the fragmentation of the Centre’s jurisdiction and the considerable risk of decisions being made which make it more difficult for the arbitrators to fulfil their task, in the case of deciding on the basis of equity.⁵⁷ The distinctive quasi-public character of an arbitration under the Convention

55. Brower and Goodman, ‘Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings,’ (1991) ICSID Rev. - FILJ, 431, 434.; Friedland, ‘ICSID and Court-Ordered Provisional Remedies: An Update,’ (1988) 2 Arb.Int. 161, p.162.

56. While concern for enforcement against a state need not be the paramount consideration in the context, there is an additional consideration where the state is the respondent: the potential prejudice to the state when the foreign investor seeks an attachment in his home country.

57. This stance is close to the views which accentuate the importance of the party autonomy

makes its exclusivity on balance appropriate in the realm of interim relief, whether such relief takes the form of a discovery order,⁵⁸ a mandatory injunction, or a conservatory attachment. If national courts wish to respect the Convention and recognize the distinctive character of ICSID arbitration, therefore, they will need to observe the exclusivity mandate with respect to provisional measures.⁵⁹

b. Pro-exclusivity Decisions by National Courts

Court decisions in Belgium and Switzerland which purported to interpret Art.26 as barring resort to a court with a request for provisional measures by a party to an arbitration clause were made in the course of the unusually complex and highly confusing *MINE v. Guinea* litigation.⁶⁰ The action of the Belgian and Swiss courts was consistent with the position taken earlier by a U.S. Court⁶¹ in regard to the same dispute in an appeal from a confirmation of an AAA award initiated despite the parties' agreement to submit disputes to ICSID arbitration. In *Guinea v. Atlantic Triton*, the French Court of Appeal (of Rennes) followed suit and in a decision vacated the attachment granted by the court below on the ground that the Tribunal was exclusively competent, both to rule upon the merits and to grant interim relief, and that therefore French courts were without jurisdiction.⁶²

revealed from their agreement to arbitrate and understand the relationship as total disinclination of the court from the arbitral proceedings.

- 58. Pursuant to Art.47, the Tribunal may make a recommendation for measures of preservation of evidence. See, *AGIP v. Republic of Congo*, 21 ILM 726 (1982), 67 ILR 318.
- 59. Friedland, *op.cit.*, p.165.
- 60. *Guinea v. MINE*, Court of First Instance (Judge for Attachment Matters) of Antwerp, 27 Sept.1985, 24 ILM(1985), pp.1639- 1642, in YCA (1987) 181, 1ICSID Rev. - FILJ 380, 383 (1986);12 YCA 181, 514(1987); 2ICSID Rev. - FILJ 170(1987);26 ILM 382(1987), YCA(1989) 82.
- 61. 20 ILM 666(1981), 21 ILM 1355(1982), 22 ILM 86(1983), 464 US 815(1983)
- 62. *Guinea v. Atlantic Triton Co.*, Cour d'appel of Rennes, 26 October, published in 1984 Revue de L'arbitrage(1985) pp.439-440 with note by G.Glecheux pp.449-456 and 24 ILM (1985),

In sum, these decisions show that some courts will enforce Article 26 of the Convention by denying interim relief to parties subject to ICSID arbitration, especially where the Tribunal has ruled that the request for relief violates the Convention's exclusivity rule.⁶³

c. Limitation : Necessity of Express Agreement

The exclusivity principle may be objected to on the basis of the uncontested fact that the Convention (Arts.53 - 55)⁶⁴ provides for national courts to have a role in ultimate enforcement of awards. Because the Convention is not fully self-contained or exclusive, in any case where an award is not complied with voluntarily, recourse to national courts is foreseen. In effect, the enforcement powers of the state are made available through its courts to back up the effectiveness of the arbitration process.⁶⁵

Inasmuch as the Convention specifically provides for national court intervention on the level of ultimate enforcement without doing so with respect to interim relief, the reasonable inference may be that no intervention was intended at the provisional stage. If the drafters of the Convention wished to exclude conservatory or provisional measures by a state court, however, they should have provided so in unambiguous terms since these measures in aid of arbitration are measures generally recognised world-wide that can be ordered by the courts.⁶⁶ A more powerful objection to the exclusivity

pp.340-344, in YCA (1986) 215.

63. *MINE v. GUINEA*, 24 ILM(1985)

64. Art.53 provides that the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention. Art.54 provides that each Contracting State shall recognise and enforce the award within its territory, and that execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought. Art.55 prevents objections from any Contracting State to the recognition or enforcement, and execution of the award on the ground that Article 54 is inconsistent with the law relating to immunity of that state or of any foreign state from execution.

65. Fox, 'States and the Undertaking to Arbitrate,'(1988) ICLQ 1, p.1

principle is that Art.47's authorization of mere recommendation, as opposed to prescriptions or orders, reveals nothing about the intent of the signatories, or of the parties consenting to arbitration under the Convention, to limit parties pursuant to Art.26 to those remedies available under the Convention.

In *Guinea v. Atlantic Triton*, Guinea's motion to vacate the attachment had been dismissed by the Commercial Court of Quimper but its decision was reversed by the Court of Appeal of Rennes as mentioned above. On appeal from the decision, the French Supreme Court held that the Convention did not exclude the power of a state court to order conservatory measures in connection with an arbitration under the Convention unless such measures by state courts were excluded by express agreement of the parties. As a result, the Supreme Court explicitly rejected the argument based on Art.26 reasoning that its text did not expressly exclude the power of a state court to order conservatory measures. The decision rendered by the Supreme Court on 18 Nov.1986 puts an end as far as France is concerned to an important question concerning the scope of the exclusivity of the arbitration under the Convention.⁶⁷

d. Amendment of Arbitration Rules

The issue as to the scope of the exclusivity of ICSID arbitration seems to have been resolved on 26 September 1984, when the Administrative Council of ICSID decided to amend the ICSID Arbitration Rules by adding a new paragraph 5 to Rule 39, which expressly confirms that if a party to arbitration under the Convention wishes to apply to any judicial or other authority for provisional relief, the parties must have so agreed in writing. The revised Rules apply only to consent given after 26 September

66. van den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions,'(1989)1 Arb.Int.2, p.17.

67. Note by Glecheux 24 ILM (1985) pp.340-344; Popular Revolutionary Republic of Guinea v. Atlantic Triton Company, France, Court of Cassation (First Civil Chamber), 18 Nov.1986, 86 ILR 76, p.85.

1984, unless the parties agree otherwise.⁶⁸ Under Rule 39(5) of the Arbitration Rules, the parties may, if they have so provided in their consent agreement, also request a court or other authority to order provisional measures. If the parties wish thus to provide for the possibility of seeking provisional measures from the courts, they may use a clause for the purpose.⁶⁹

Nevertheless, Rule 39(5) runs contrary to the general recognition noted by the Tribunal in the *Atlantic Triton* case that recourse to judicial provisional measures of protection is not inconsistent with an arbitration agreement. Because of para.(5) parties must be careful to include the stipulation in the arbitration clause.⁷⁰ Para.(5) has the further disadvantage that it excludes, as a practical matter, recourse to judicial provisional measures where the consent of the contracting state is constituted by a provision of its legislation or a bilateral treaty.

In any case, parties resorting to ICSID arbitration who do not want to exclude such possibility should specify so in their arbitration agreement. It is also to be stressed that in doing so, states should pay great attention to the drafting of such clauses in order not to waive (if they do not want to do so) their immunity from execution, which is left untouched by the Convention.

As in the *MINE* case, a state party could get different decisions from different jurisdictions. While there have been debates as to whether this new rule fairly reflected

68. Art.44, ICSID Convention; The additional para (5) to Rule 39 provides as follows:

“Nothing in this Rule shall prevent the parties provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures prior to the institution of the proceeding, or during the proceedings, for the preservation of their respective rights and interests.”

69. *Commentary*, 9 YCA (1984) 173

70. There may be a model clause for the purpose :

Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests. See, Naon, ‘ICC Arbitration and Developing Countries,’ (1993) ICSID Rev. - FILJ 116, p.145.

the Convention's wording and intent, the consensus of national courts and commentators has been that, in any event, parties to an arbitration agreement must bring to arbitration all their disputes which are the subject of such agreement and thus forego submitting any claims to national courts.⁷¹

G. Iran-US Claims Tribunals

1. Algiers Accords and the UNCITRAL Rules

Disputes between nationals of the United States and Iran are arbitrated by the Iran-United States Claims Tribunal (The Tribunal) which was established by the Algiers Accords as a consequence of the resolution of the Iranian hostage crisis.⁷² The UNCITRAL Arbitration Rules are modified for the arbitral proceedings before the Tribunals as the Tribunal Rules.⁷³

Art.26 of the UNCITRAL Rules remains unchanged in the Tribunal Rules. The Tribunal is empowered under Art.26 of the UNCITRAL Rules to grant interim measures of protection at the request of a party. Art.26 of the Rules is understood broadly or narrowly on the basis of agreement between the parties to submit their disputes to the Tribunal.⁷⁴ In a broad interpretation of Art.26(1) of the UNCITRAL Rules, a tribunal

71. Delaume, 'State Contracts and Transnational Arbitration,' (1981) AJIL 784, 794.

72. General Declaration, 20 ILM 224(1981); Claims Settlement Declaration, 20 ILM 230(1981). Iran-United States, Case A/1 (Issue II), Full Tribunal, 14 May 1982, 1 Iran-US CTR 144. For the Iran-United States Claims Tribunal, both Iran and the United States concluded the Algiers Accords which provided for the release of the 52 hostages seized at the American Embassy in Teheran on November 4, 1979. The Algiers Accords comprised two documents: The Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981) (the "General Declaration"), reprinted in 20 ILM 224(1981), and The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981) (the "Claims Settlement Declaration"), reprinted in 20 ILM 230(1981).

73. Final Tribunal Rules of Procedure dated May 3, 1983, in 2 Iran-US CTR 405

74. Caron, *op.cit.*, p.478.

has power to order “any interim measures it deems necessary in respect of the subject-matter of the dispute.” In a narrow interpretation of Art.26(1), on the contrary, the list of measures should be “measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.”

Since the object of interim protection is to preserve the respective rights of the parties pending the decision of the Tribunal, interim relief is appropriate to prevent any measure capable of prejudicing the execution of any decision which may be given by the Tribunal. Thus, the application of Art.26(1) of the Tribunal Rules is not only appropriate to protect the jurisdiction of the Tribunal and the integrity of its awards, but also to prevent irreparable injury to one of the parties.

Besides the powers allowed in Art.26 of the Tribunal Rules, the Tribunal has referred to its inherent power to order interim measures to preserve the respective rights of the parties and to ensure that the Tribunal’s jurisdiction and authority should be made fully effective. At times when the inherent power of the Tribunal is invoked, the Tribunal would not even mention Art.26.

2. *Prima Facie* Jurisdiction

Since the Tribunal has power to issue interim measures pursuant to Art.26 of the Tribunal Rules in order to preserve the *status quo*, it is a threshold question whether there exists any threat of grave or irreparable damage to a party requesting such measures, or to the Tribunal’s jurisdiction such as to justify the granting of interim measures.⁷⁵ Upon the request for interim measures, therefore, the Tribunal has to decide both its jurisdiction to determine jurisdiction and its power to order interim measures.

Like that of any other arbitrators, the jurisdiction of the Tribunal is based on the

75. Atlantic Richfield Co. v. Iran, Case No.396, Award No. ITM 50-396-1, 8 Iran-U CTR 179, YCA (1986) 362, Boeing company v. Iran, Case No. 222, Award No. ITM 38-222-1, 6 Iran-US CTR 43, YCA (1984) 312

agreement of the parties to refer their disputes to arbitration, and is bound by the scope of the arbitration agreement. On the one hand, the existence of jurisdiction is a necessary condition on which the Tribunal relies to order interim measures.⁷⁶ On the other, by the time the Tribunal determines the full existence of the jurisdiction before interim measures of protection are taken, the measures will surpass the “interim” stage. Overcoming this difficulty where there are conflicts between interim measures required from the Tribunal and the threshold question over the existence of jurisdiction, the Tribunal has reasoned that it need not fully and finally determine the existence of jurisdiction over a claim for which interim measures of protection are sought.

The main criterion required by the Tribunal for the grant of interim measures is that of *prima facie* jurisdiction. Once it finds the existence of *prima facie* jurisdiction, the Tribunal is most likely to advance a step further to decide whether there is any necessity to grant interim measures of protection.

3. Requirement for Provisional Measures

It is established that the party requesting interim measures from the Tribunal must show that there exist some threats of grave or substantive harm or prejudice to the party, or to the Tribunal’s jurisdiction, so that he cannot await the Tribunal’s final decision on the merits. The Tribunal has used the language of “irreparable prejudice” or “irreparable harm” which should not be interpreted as strictly as in the practice of either jurisdiction of the parties.⁷⁷ Given that Art.26(3) of the Tribunal Rules provides for sale of perishable goods, the possibility of monetary compensation does not preclude interim measures of protection. “Irreparable” prejudice or harm could be demonstrated even in cases where damages might be an adequate remedy.

76. Component Builders, Inc. v. Iran, Case No. 395, Award No. ITM/ITL 51-395-3, 8 Iran-US CTR 216, Aeronutronic Overseas Services, Inc. v. Iran, Case No.158, Award No. ITM 47-158-1, 8 Iran-US CTR 75.

77. Baker & Davies, *op.cit.*, p.139.

The test of “irreparable harm” was taken into account in *Iran v. U.S. Case A/15*⁷⁸ where the U.S. party removed two boxes of spare parts labelled “classified” which were noticed by the expert appointed by the Tribunal. The Tribunal doubted that the mere removal of the two boxes and their storage in a different location would increase the risk of impairing the relief sought by Iran in the case, i.e., return of the equipment to Iran. The Tribunal therefore did not find that irreparable harm had been caused to Iran by the action.

From the nature of the interim measures of protection under Art. 26, where the measures requested would make impossible the execution of the Final Award of the Tribunal, it would refuse to issue such request. The Tribunal also refrained from ordering measures against a party if that party assured it that it would not act in a way that might be prejudicial to the other party. In *Panacavier S.A. v. Iran*⁷⁹, the Tribunal accepted the claimants’ statement that it is not the parties’ intention to obtain a judgment from another court on the merits of the issues before the Tribunal.

In *United Technologies International Inc. v. Iran*⁸⁰, the Tribunal denied the relief requested by the respondents of prevention of sale of components on the basis of the claimant’s assurance that it would not sell the components without the Tribunal’s approval. Moreover, by way of counterclaim, the respondents sought, inter alia, an award ordering the claimant ‘to deliver the articles repaired’ held in the claimant’s possession. It was observed that the request for interim measures was identical to one of the claimant’s claims on the merits. Under such circumstances, the Tribunal denied the request on the ground that such an interim award “would amount to a provisional

78. Islamic Republic of Iran v. U.S.A., Iran - US CTR Decision in case no. A15(II:A and II:B)(DEC52-A15(II:A and II:B)-FT) of 24 Nov.1986, in YCA (1988) 237, Decision in cases Nos. A15(IV) and A24 (DEC 116-A15(IV) & A24-FT) of 18 May 1993, YCA(1994) 389.

79. Interim Award in Case No.498(ITM 64-498-1) of 4 Dec.1986, reported in YCA (1988) 237.

80. United Technologies International, Inc. v. Iran Helicopter Support and Renewal Company, Iran - US CTR Decision in Case No.114(Dec 53-114-3) of 10 Dec.1986, in YCA (1988) 298

judgment on one of the claimant's claims." In *Behring International Inc. v. Iranian Air Force*⁸¹, the Tribunal refused to order the transfer of the respondents' property to their custody and control in a warehouse of their choice because doing so "would be tantamount to awarding respondents the final relief sought in their counterclaim."

In *Harris International Telecommunication, Inc. v. Iran*⁸², the Tribunal held that the domestic and the Tribunal cases should involve the same subject matter. The Tribunal did not grant an interim relief if this would constitute the principal relief requested. The Tribunal's reluctance to granting interim measures of protection shows clearly that such measures would give the requesting party the equivalent of a final judgment on one of its claims.

When ordering a stay of proceedings as a result, the Tribunal has assured itself that the parties involved in domestic and Tribunal proceedings were the same, and that the cases arose out of the same contract. Interim measures may be ordered only against those who are parties in the relevant case. In *Atlantic Richfield v. Iran*⁸³, the Tribunal refused to direct the US Government to act because it was not a party to the relevant case.

In *Boeing Company v. Iran*⁸⁴, the claimant had been sued by the respondent in a US court and it had filed certain counterclaims in those proceedings. Unlike the principal claim before the Tribunal, the counterclaims had been awarded. Subsequently, Iran requested the Tribunal to make an order preventing execution of this US judgment. The Tribunal denied interim measures against the enforcement of a US judgment for monetary damages against Iran. It was argued that the case in which both parties

81. *Behring Int., Inc. v. Iranian Air Force*, Case No. 382, Award No. ITM/ITL 52-382-3, 3 Iran-US CTR 173, 8 Iran-US CTR 44, 8 Iran-US CTR 238, YCA (1986) 349.

82. *Harris Int.TeleCom. v. The Iranian Ministry of Defence, and others*, ICC Partial Award in Case No.409(323- 409-1) of 2 Nov.1987, YCA (1989) 405.

83. 8 Iran-U CTR 179

84. 6 Iran-US CTR 43

voluntarily proceeded should be distinguished from other cases where the Tribunal did order relief to parties “summoned to appear as unwilling defendants before other fora.” It was further argued that Iran, by its failure to seek relief earlier had waived its right to do so, and its persistence in pursuing its claims in the US must be deemed to estop it from asserting that the Algiers Accords entitled it a stay of judgment in that suit. This case may be qualified as one where a party did not receive the protection of the Accords but was forced to appear in court and defend himself by filing his counterclaims. Besides these requirements, the Tribunal has not applied such general requirement of likelihood of success as required in several jurisdictions. Furthermore, the Tribunal never explicitly refers to the concept of urgency which is required in Civil law countries.⁸⁵

4. Types of Interim Measures of Protection

a. Transfer of Goods

The Tribunal was asked to take interim measures of transferring or returning goods so as to prevent their deterioration. In *Behring International Inc. v. Iranian Air Force*⁸⁶, sophisticated electronic equipment belonging to Iran was being stored in the United States in a warehouse that both parties agreed was inadequate to preserve the goods. The respondents requested the transfer of goods to a warehouse of their choice. The Tribunal decided that it could not allow the transfer to the respondents of the possession, custody and control of the goods, as this would be tantamount to awarding the final relief sought in their counterclaim. The Tribunal, however, granted the respondents’ request after ascertaining that the claimant was not in a position to move the goods to an air-conditioned portion of its own warehouse.

85. van Hof, *Commentary on the UNCITRAL Arbitration Rules - The Application by the Iran-U.S. Claims Tribunal* (1991), p.190.

86. *Behring Int., Inc. v. Iranian Air Force*, Case No.382, 4 Iran-US CTR 509.

The Tribunal realised that the claimant might have a possessory security interest in the goods (a “warehousemen’s lien”) that would be defeated by their transfer of the goods and concluded that to the extent this lien existed, it deserved protection. Nonetheless, the Tribunal concluded that it was not the appropriate forum for determining how to protect any lien and held that it could allow a US court to order provisional relief pursuant to Art.26(3) of the Tribunal Rules. It is remarkable that the Tribunal based the power of taking interim measures on inherent power in general even though the order issued in the case fell within the narrow examples given in the article.⁸⁷

In *Iran v. United States, Case A/15*⁸⁸, Iran requested the return of two boxes that it argued the U.S. had “removed forcibly” from its original warehouse. The Tribunal denied the request on grounds that the goods had merely been transferred by the respondents to a “certified” warehouse because they had been marked classified. The Tribunal concluded that this transfer did not cause irreparable harm.

b. Prevention of Sale of Goods

In *United Technologies International Inc. v. Iran*⁸⁹, the respondent had requested interim measures, asking the Tribunal to prevent the claimant from selling certain helicopter components in dispute. On the claimant’s assurance that it would not sell, the Tribunal denied the request. In *Behring International Inc. v. Iranian Air Force*⁹⁰, the Tribunal explicitly referred to Art.26 of the Tribunal Rules in its interim award ordering the claimant to refrain from selling goods in dispute. The Tribunal relied on Art.26 of the Tribunal Rules to “request” the claimant to “take whatever measures are

87. Baker & Davies, *op.cit.*, p.134.

88. YCA(1994) 389.

89. YCA (1988) 298.

90. 3 Iran-US CTR 173, 8 Iran-US CTR 44, 8 Iran- US CTR 238, YCA (1986) 349.

necessary to assure that the sale of assets + is not carried out” so as to afford the parties “an opportunity to present more fully and argue their contentions.”

In *Shipside Packing Co. v. Iran*⁹¹, the Tribunal requested “the claimant to take appropriate measures to ensure that no further steps are taken to sell the goods and properties held by the claimant,” until both parties could file their comments on the respondent’s request for an interim award precluding the sale. The Tribunal relied on its “inherent power to issue orders to conserve the respective rights of the parties and to ensure that its jurisdiction and authority are made fully effective.” The Tribunal did not mention Art.26, even though an order preventing such a sale is clearly consistent with the intent of Art.26 to conserve goods in dispute. The practice of the Tribunal indicates that this inherent power is in no way restricted by the language in Art.26 of the Tribunal Rules.⁹²

c. Stay of Parallel Judicial Proceedings

As the Tribunal has often emphasized, states are, in accordance with general principles of international law, responsible for the acts of their judiciaries in violation of international obligations.⁹³ Once a state party has acceded to an international agreement for arbitration, then so long as and to the extent that the arbitration is in progress, the parties are under an international obligation to comply with whatever the Tribunal recommends as provisional measures and inadequacy of contemporary municipal legislation will not afford an excuse for failing to do so. However, one of the complicating issues is how to deal with duplicate proceedings before the courts of the two countries.⁹⁴ The principles of interim measures have developed from the cases

91. USA (Shipside Packing Company) v. Iran, Case No 11875, Award No. ITM 27- 11875-1, 3 Iran-US CTR 331, YCA (1984) 297.

92. Rockwell, International Systems, Inc. v. Iran, 2 Iran-US CTR 368.

93. Aeronutronic Services v. The Air Force of Iran, Case No.158, Award No. ITM 44-158-1, 7 Iran-US CTR 217.

which are dominated by the issue.

It is evident from the Tribunal cases that the Tribunal has an inherent power to protect its jurisdiction when a claim is pending before it. Apart from protecting the physical subject matter of a case before it, or the rights of the respective parties where appropriate, the Tribunal also has its inherent power to protect its own jurisdiction in cases where the risks of inconsistent decisions in parallel and duplicative proceedings instituted in other fora have rendered this necessary.⁹⁵

When a party before the Tribunal has sought relief from duplicative or overlapping proceedings commenced in another forum by its opposing party, notwithstanding an arbitration agreement, a tribunal may consider it appropriate to “order” the party concerned to have the court proceedings temporarily stayed.⁹⁶

In accordance with General Principle B of the General Declaration, Iran and the United States have agreed to “terminate all litigation as between the government of each party and the nationals of either country, and to bring about the settlement and termination of all such claims through binding arbitration.” Art.VII(2) of the Claims Settlement Declaration confirmed that the claims filed before the Tribunal shall be considered excluded from the courts of Iran or of the United States or of any other court.⁹⁷ Art.II(1) of the Claims Settlement Declaration between Iran and the United States, however, excludes from the jurisdiction of the Tribunal “claims arising under a binding contract between the parties specifically providing that any disputes thereunder

94. Reichert, ‘Problems with Parallel and Duplicate Proceedings: The Lispendence Principle and International Arbitration,’ (1992) Arb.Int. 237.

95. It should not be neglected that the ‘inherent power’ of the Iran-U.S. Claims Tribunal is grounded in the international agreement, which created it. Nonetheless, even a contract-based private arbitral tribunal enjoys some inherent authority over the conduct of its proceedings.

96. Ford Aerospace v. Iran, Case No.93, Award No. ITM 16-93-2, 2 Iran-US CTR 281; Harris Int.TeleCom. v. Iran, see footnote 532, page 193.

97. Watkins- Johnson Company v. Iran, Case No.370, Award No. ITM 19-370-2, 2 Iran-US CTR 362.

shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position.”⁹⁸

Under the peculiar legal structure that created the Tribunal, it had in particular strong power to override the jurisdiction of municipal courts even though it does not as a rule have the power to impose sanctions or to impose coercive orders. Such a conclusion as to purely preliminary restraints does not contradict the rule that for interim measures subsequently to be ordered there must appear *prima facie* to be a basis on which the jurisdiction of the Tribunal might be founded.

Most but not all of these “parallel” proceedings were suits filed in Iranian courts by Iranian respondents. The requests for interim measures thus resulted in constant relitigation of the Tribunal’s jurisdiction over certain Iranian counterclaims and of its power to order the stays.⁹⁹

In *E-Systems Inc. v. Iran*¹⁰⁰, the respondent sued the claimant in an Iranian court on the same contract that gave rise to the claims previously filed by the claimant with the Tribunal. The claimant requested a stay or dismissal of the proceedings in the Iranian court action. The Tribunal ordered the requested interim relief: “This Tribunal has an inherent power to issue such orders as may be necessary to conserve the respective rights of the parties and to ensure that its jurisdiction and authority are made

98. Where a contract contains a provision which requires the parties to the contract refer their disputes to an arbitration under a given municipal law of a country, the contract provision requiring recourse to arbitration is not a provision for the “sole jurisdiction” of any court. See, *Gibbs and Hill, Inc., v. Iran*, (Case No.6) Iran-U.S. C.T., 5 Nov. 1982, 68 ILR 559, *Unidyne Corporation v. The Islamic Republic of Iran*, Iran- United States Claims Tribunal Award in Case No.368(551-368-3) of 10 Nov. 1993.

99. *Touche Ross v. Iran*, Case No.480, Award No.ITM 26-480-1, 3 Iran-US CTR, 59, 200, *Ford Aerospace v. The Air Force of Iran*, Case No. 159 Award No. ITM 28-159-3, 3 Iran-US CTR 384, *RCA Global Communications, Inc. v. Iran*, Case No.160, Award No. ITM 30-160-1, 4 Iran-US CTR 9. *United States (Linen, Fortinberry & Assoc) v. Iran*, Case No. 10513, Award No. ITM 48-10513-2, 8 Iran-US CTR 85, *Questech, Inc. v. Iran*, 2 Iran-US CTR 96.

100. *E-systems, Inc. v. Iran*, Case No. 388, No. ITM 13-388-FT, 2 Iran-US CTR 51, 71 ILR 631, YCA (1984) 216.

fully effective. Not only should it be said that the award to be rendered in this case by the Tribunal + will prevail over any discussions inconsistent with it rendered by Iranian or United States courts, but, in order to ensure the full effectiveness of the Tribunal's decisions, the Government of Iran should request that actions in the Iranian Court be stayed until proceedings in this Tribunal have been completed.”¹⁰¹

Besides the application of the inherent power on which the Full Tribunal relied, Holzmann and Mosk JJ. in their concurring opinion, argued that its power to order a stay may be based on Art.26. They argued that “the application of Art.26(1) of the Tribunal Rules is not only appropriate to protect the jurisdiction of the Tribunal and the integrity of its awards, but also to prevent irreparable injury to the claimant.”¹⁰² The Full Tribunal in the E-Systems might have found it prudent to rely on “inherent power” rather than on Art.26. The language of Art.26 is not clear whether “any” measures include orders of staying judicial proceedings.

The Tribunal relied on inherent power not only to stay Iranian court proceedings brought by the respondents but also arbitral proceedings brought by the claimants before the International Chamber of Commerce. In *Ford Aerospace v. The Air Force of Iran*, pending final decision by the Tribunal, in order to ensure the full effectiveness of its decisions, it has ordered not only a stay of proceedings in Iran, but also a stay of parallel arbitral proceedings before ICC.¹⁰³ In *Reading and Bates Corporation v. Iran*¹⁰⁴, the claimant had not only filed its claim with the Tribunal, but had also on the same subject matter initiated arbitration proceedings against one of the Respondents, the National Iranian Oil Company (NIOC), at the ICC Court of Arbitration in Paris. NIOC

101. E-systems, Inc. v. Iran, Case No. 388, No. ITM 13-388-FT, 71 ILR 631, 639.

102. *Ibid.*

103. *Ford Aerospace v. The Air Force of Iran*, Case No.159, Award No. ITM 39-159-3, 6 Iran-US CTR 104, YCA (1985) 308.

104. *Reading and Bates Corporation v. Iran*, Interim Award in Case No.28(21-28-1) of 9 June 1983, 2 Iran-US CTR 401, YCA (1984) 226.

was summoned to appear in those proceedings on 20 June 1983. NIOC, under reference to General Principle B of the General Declaration and the Claims Settlement Declaration, had filed on 3 June 1983 a motion with the Tribunal to order the claimant to withdraw his claim before the ICC to require the U.S. Government to perform its duties under the Algiers Declarations and to stay the proceedings pending compliance with the above two requests. Based on the inherent power enunciated in the *E-systems* case, the Tribunal ordered the claimants to move for a stay before the ICC until the Tribunal could render a decision.

5. Interim Measures before the Courts

Before the Algiers Accords were signed on January 19, 1981, lawyers for American companies sought judicial attachments of Iran Government assets outside of as well as within the jurisdiction of the courts in the United States. They were concerned about the possibility that the courts in the United States might determine that they did not have jurisdiction over the various Iranian Government agencies under the Foreign Sovereign Immunities Act.¹⁰⁵ Furthermore, they were not sure whether the courts would interpret the various provisions as permitting pre-judgment attachment against assets of foreign states and agencies owned by them.¹⁰⁶ In order to prepare for the worst scenario, they sought and achieved attachment orders before the courts in Germany.¹⁰⁷ The American parties were relieved to see that Art.26(3) of the Tribunal Rules did not change from the language of Art.26(3) of the UNCITRAL Arbitration Rules to the effect that a party to a claim before the Tribunal, in obtaining a provisional

105. 28 USC 1602-1607 (1994)

106. Newman, 'A Personal History of Claims Arising out of the Iranian Revolution,' (1995)27 NY U J Int'l L & Pol 631, p.637.

107. For the attachment proceedings before the Court of Appeal of Frankfurt, see, Sandrock, 'Prejudgment Attachments : Securing International Loans or other Claims for Money,' (1987) Int.Law.1, pp.23-25.

order from a national court to secure an award or potential award, does not do anything “incompatible” with the proceedings before the Tribunal.

A major issue in the cases before the Tribunal was when a permissible request for judicial protection became an impermissible attempt to initiate claims outside the Tribunal. The cases where the Tribunal denied requests for interim measures should be explained by the fact that the party requesting interim measures, thus seeking protection by the Tribunal, was the party who initially bypassed it, or more generally, by the fact that the party seeking protection was forced to bear the consequences of its earlier uncooperative attitude. To the contrary, the Tribunal has not intervened in judicial proceedings initiated for the purposes of obtaining security. This attitude could be justified on the basis of Art.26(3) of the Tribunal Rules which allows judicial interim measures. Thus, a party may start a necessary ancillary proceeding before a competent national court to preserve the *status quo* as between the parties to the case, rather than to jeopardize the position of either party *vis-à-vis* the Tribunal. It is accepted that interim measures from national courts are not in conflict with the jurisdiction of the Tribunal to safeguard the ultimate award, and it is necessary to afford a party in need of such measures an opportunity to petition a court of competent jurisdiction for such provisional relief and to implement any order issued by such court.

In *Atlantic Richfield Co. v. Iran*¹⁰⁸, the respondent requested the Tribunal to issue an order requiring the Government of the United States and the claimant to take all appropriate measures to ensure claimant’s acceptance of the Algiers Accords and to withdraw the writs of attachment before a New York Court on an Iranian bank account. Alternatively the respondent asked the Tribunal to order the claimant to withdraw its case before the court. The Tribunal held that as for the US Government, it was not a party to the case, so that the Tribunal could not order interim measures against it. Furthermore, it held that it could not order interim measures against the claimant

108. 8 Iran-U CTR 179

because it did not find any threat of grave or irreparable damage to the respondent, or to the Tribunal's jurisdiction to exist. To the Tribunal, the effect of the attachment was "to preserve the *status quo* as between the parties to the present case, rather than to jeopardise the position of either party *vis-à-vis* the Tribunal."

In *Panacavier S.A. v. Iran*¹⁰⁹, the Tribunal was faced with a request from the respondent to order the claimant to withdraw the action which it had initiated in the courts of Basel, Switzerland, and to order the claimant to obtain a stay of a hearing there. Because of the lack of precise information from the respondent, the Tribunal had to rely on the claimant's characterisation of the nature of the Swiss proceedings. It accepted the claimant's assurance that the claim for damages that it had filed was a necessary ancillary procedure to its application for an attachment of a bank guarantee. With respect to the latter, the Tribunal considered its effect was to "preserve the *status quo*" between the parties, rather than to jeopardise the position of either party *vis-à-vis* the Tribunal. The Tribunal, therefore, could see no risk of grave or irreparable harm resulting to either party or to its jurisdiction and denied the requests.

In *Bendone-Derossi International v. Iran*¹¹⁰, the Tribunal also denied the respondent's request for interim measures seeking a stay of enforcement proceedings of an attachment in Germany. In the case, the claimant filed with the Tribunal a claim based on an award of damages in the claimant's favour made by a sole arbitrator under the rules of the ICC. The claimant sought from the Tribunal the enforcement of the ICC award. To enforce the ICC award, it had obtained an attachment of shares in Germany. The Respondent filed a petition in which it stated that the claimant had sought to enforce the ICC award by obtaining an attachment order in the Frankfurt am Main Regional Court on 9 June 1983 in respect of certain shares owned by the Respondent.

109. YCA (1988) 237.

110. Bendone- Derrossi Int. v. Iran, Case No.375, Award No. ITM 40-375-1, 6 Iran-US CTR 130, YCA (1985) 320.

The Respondent requested that the Tribunal issue an order staying such enforcement measures on the ground that, once filed with it, the claim was excluded from any other court by virtue of Art.VII(2) of the Claims Settlement Declaration.¹¹¹ The Tribunal rejected the respondent's request on the ground that it was not satisfied that it had *prima facie* jurisdiction because it could not appropriately act as a court issuing *exequatur*. Judge Holzmann concurred "on the ground that Art.26 of the Tribunal Rules makes it clear that the claimant, in obtaining an order of attachment from the German court, did not do anything 'incompatible' with the proceedings before this Tribunal."

In *Behring International Inc. v.Iranian Air Force*¹¹², the Tribunal explicitly afforded the claimants an opportunity to seek judicial interim measures. In the case, Iran sought an order to transfer certain goods from the claimant's warehouse. The claimant objected on the theory that transfer would deprive it of its lien on the goods as security for payment of storage costs. The Tribunal found that it lacked the jurisdictional power to issue an order safeguarding Behring's security interest, at least for storage charges arising after the date when its jurisdiction was not existent. In order to protect Behring's security interest completely, the Tribunal invited Behring to seek judicial protection from American courts. Its inability to provide these remedies justified its decision.

Though the grounds for judicial remedies are founded on the same allegations of breach of contract that form part of the claim before the Tribunal, it is not "to obtain a judgment from another court on the merits of the issues before the Tribunal."¹¹³ It is considered that such cooperation between the Tribunal and the municipal courts of one

111. Art.VII(2) of the Claims Settlement Declaration confers on the Tribunal the power to decide: "Claims of nationals of Iran against the U.S., and any counterclaim which arises out of the same contract, transaction, or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit, or bank guarantees), expropriations or other measures affecting property rights+."

112. 3 Iran-US CTR 173, 8 Iran-US CTR 44, 8 Iran-US CTR 238, YCA (1986) 349.

113. *Panacaviar v. Iran*, YCA (1988) 237.

of the state parties to the Algiers Accords was justified necessary by the operation of the peculiar jurisdictional provisions of the Accords upon the particular facts and circumstances of the case.¹¹⁴

II. Judicial Provisional Remedies

A. Generally

Powers of a court in relation to the arbitral process may be found in national laws on arbitration, but also in other statutes giving courts exceptional jurisdiction to grant urgent and temporary relief pending resolution of a dispute on the merits, and in the residual and discretionary powers of courts as developed in case law.¹¹⁵

In judicial proceedings, an established procedural framework provides parties with the possibility of obtaining interim relief pending a decision on the merits of their case. Orders in aid of arbitration are usually sought in the state where it is held. It is also possible that the courts of one state may be competent to make orders in aid of an arbitration conducted in another state. The interim measures which are binding and enforceable, such as interim injunctions, orders of attachment, security, and other mechanisms, may be decided only by national courts so as to protect parties' property or interests.

114. *Behring v. Iran*, 3 Iran-US CTR 173, 8 Iran-US CTR 44, 8 Iran-US CTR 238, YCA (1986) 349. In the case, the Tribunal held that it might allow for a court of the U.S., if and to the extent it deemed it appropriate, to take certain measures for removal of Iranian parties' property to an alternate location unless they satisfy their conditions.

115. In Scotland, the Administration of Justice (Scotland) Act 1972, s 1, empowers the court to order the production and recovery of documents in connection with "civil proceedings" already before that court or "likely to be brought." In *Anderson v. Gibb*, 1993 SLT 726, the court held that the expression "civil proceedings" should receive its ordinary, wide, meaning, applying to arbitration.

B. Correlation between National Courts and Arbitral Tribunal

In theory, the courts always have a concurrent jurisdiction over disputes which are the subject of a reference to arbitration, so long as the reference to arbitration remains. This leads to the question of the distribution of competence for provisional relief between the domestic courts and the arbitrators. Some countries are favoured as a place for arbitration in that the courts in the jurisdictions are reluctant to intervene in the arbitral process, thereby reducing the potential for judicial interference with an arbitral tribunal. On the other hand, some degree of intervention by national courts may contribute to the efficacy of arbitration, whether by bringing to bear their powers of compulsion which may be necessary to obtain or preserve evidence, or by frustrating dilatory tactics by ordering a recalcitrant party to comply with the procedural requirements of contractually stipulated rules of arbitration. In particular, when there is no arbitrator to deal with the application for an interlocutory injunction, the only way for the applicant to proceed is to apply to the court of the place where the injunction is to be given effect.

After the constitution of the tribunal there is in principle a parallel competence of courts and arbitral tribunals for issuing interim measures of protection, since the arbitrators themselves have inherent power to order parties to provide certain interim measures of protection, although directions to third parties and measures requiring the sanction of immediate enforcement are beyond their authority. The competence of courts and arbitral tribunals for interim relief is of different quality and weight. The nature of the arbitral tribunal itself, especially the parties' striving for efficiency as an expressed or as an implied term in the arbitration agreement, establishes a hierarchy of competence for interim relief during the course of the arbitral proceedings. Before the constitution of the arbitral tribunal, therefore, the courts may condition their provisional measures up to the constitution of the tribunal so as not to make interference in an

impermissible way into the competence of the parties. Once an arbitral tribunal is substituted, the court, however competent it may be, should not exercise its power over the application for interim measures.

In the course of the arbitral proceedings, from his familiarity with the legal and factual details of the case and practical experience, the arbitrator is normally in the best position to decide whether an interim remedy will lead to a sacrifice of the arbitral goals of informality, simplicity, confidentiality and speed, and if so, whether the sacrifice should be made.

Once the arbitration is under way, the necessary flexibility as to the timing of the interim measures may be achieved by authorising the chairman to order interim measures subject to revision by the arbitral tribunal.¹¹⁶ The transfer of power from the parties to the arbitrator may follow from the general procedural powers of the tribunal.¹¹⁷ The competence of the courts revives only in those exceptional cases where the coercive power from the court is necessary to prevent a denial of justice.

In certain respects, namely the ordering of discovery and interrogatories, the powers of the court duplicate those of the arbitrator when a party wishes to avail himself of these overlapping powers. In such cases, he should first have recourse to the arbitrator, and should not invoke the court's power unless the arbitrator's order proves ineffectual. Although they are not precluded from granting injunctive relief in cases involving arbitration agreements, therefore, the courts would err in granting an interlocutory injunction after the arbitral tribunal is supposed to deal with such matters.¹¹⁸

116. Article 1051(1) of the Dutch law provides for an express authorization in the context of summary proceedings.

117. Art.19(1), 19(2) of the Model Law, Art.31(2) of the UNCITRAL Rules, Art.182(1), 183(2) of SPIIL

118. In *Merrill Lynch, Pierce, Fenner & Smith v. Salvano*, 999 F.2d. 211 (7th Cir. 1993), the Court of Appeals held that the extent of the district court's discretion in granting and extending a Temporary Restraining Order in the case was restricted when the arbitral panel was poised to

It is normal for national courts to follow a non- intervention policy in an arbitral process. As a last resort, if it proves that the complaining party has lost the arbitration, and has done so in circumstances amounting to real and causative injustice, the practical course will be to set aside or remit the award.¹¹⁹ Nevertheless, there may be instances where the arbitral tribunal is not in a position to grant interim relief in the same effective way as the municipal courts. It is evident that the parties' right for effective judicial relief will be protected by guaranteeing recourse to the courts and avoiding any denial of justice.

C. Categories

In circumstances where it is evident that the constitution of arbitral tribunals would take some time, it is the court of the place of arbitration which appoints an independent expert to report on crucial evidence for subsequent arbitral proceedings.¹²⁰ The appointment of experts may also be useful and appropriate to make a report at a stage of partial completion of a construction project. Without effective intervention by a court in aid of arbitration, evidence of a disputed construction technique or performance may soon be covered up by tons of cement or other building materials.¹²¹ In exceptional circumstances in which a key witness is about to go abroad and it is not likely that he will return soon, the courts in Scotland would grant an application for taking oral evidence necessary for a prospective arbitration in a foreign country.¹²²

consider the necessity of any injunctive relief. Similarly, in a Hong Kong case, the court held that even though there was no legal barrier of granting *subpoena duces tecum* order in relation to production of certain documents before the arbitral tribunal, the power of the court should be exercised only after the request or the approval of the arbitral tribunal was made. *Vibroflotation A.G. v. Express Builders Co.Ltd.*, Hong Kong : High Court of Hong Kong (Kaplan J.), CLOUT case 77, YCA XX(1995)

119. Mustill and Boyd, *op.cit.*, p.523.

120. Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (2nd ed., 1991), p.339.

121. ICC Award 5650/1989, reported in YCA (1991) 85.

Despite the presence of an arbitration clause, the courts may be able to intervene to sell or dispose perishable goods before they lose market value. In appropriate circumstances a court may grant an injunction to prevent the payment of a guarantee or the calling of a standby letter of credit if the payment might frustrate the arbitration and prejudice a party.¹²³ In cases involving disputes out of partnerships or joint venture contracts, a receiver may be appointed by the court pending arbitration to maintain a business whose management might otherwise be paralysed by the dispute.

As a security, court powers may be invoked when a party seeks to obtain payment of a debt whose amount is fixed, incontestable, due, and payable pending the outcome of arbitration. In some jurisdictions, a party may request security for costs during arbitration similar to ordinary court action in which security for legal fees and costs may be required as a condition of proceeding with the action.

Orders for conservatory attachment are also granted in many jurisdictions during arbitral proceedings or prior to a final award. Those orders may allow assets of the respondent to be secured for the subsequent enforcement of an award in favour of the claimant.¹²⁴ The orders for conservatory attachments do not conflict with the obligations of the New York Convention to refer parties to arbitration, since attachment is only a provisional measure subject to an arbitration award which the state would later be obliged to execute.

Since international arbitration has become a typical means to settle international disputes, claimants should not be deprived of security devices available through national courts. Such devices may cause recalcitrant parties to cooperate in advancing the arbitral procedure as well as serve to ensure payment of awards.

122. *Galloway v Carmichael*, 1937 SC 135

123. *RBSD v. Dongsan*, see footnote 351, page 121, ICC Award Case No. 4237/1984, Jarvin & Derains, *Collection of ICC Arbitral Awards : 1974-1985* (1990), p.169.

124. *Scherk v. SGM*, YCA (1979) 286

In continuing arbitral proceedings, the arbitrator is authorised to require the parties to produce relevant documents, written testimony or depositions in advance of hearings, and procedural assistance may be sought from the competent courts by the parties when orders are not complied with.

An arbitral tribunal has an inherent power, subject to the agreement to arbitrate, to appoint an independent expert to take evidence from the third party. Nevertheless, the tribunal has no coercive power to summon the third party to attend as a witness or to cooperate with the expert. Therefore, when discovery procedure is necessary to obtain evidence from a third party, or when the prospective witness is unlikely to attend, an application must be made to the courts of competent jurisdiction.¹²⁵

Where pursuant to the law of the seat of the arbitration, the arbitral tribunal under the ICC Rules does not have any power to order interim measures requested by one of the parties, the request of such measures belonging to the competence of the ordinary judge is not barred by an arbitration agreement.¹²⁶

If all the parties to an ICC arbitration are given appropriate notice for presenting their cases before national courts and proper opportunity for avoiding the dangers arising from not being present before the courts, a recourse for an expert testimony to the courts can be construed as a conservatory measure in the concept of 'interim or conservatory measures' in accordance with Art.8(5) of the ICC Rules. Thus, by resorting to a judicial expertise according to Art.8(5), a party does not renounce the arbitration clause.¹²⁷

As far as discovery procedure is concerned, many Continental arbitrators are not comfortable in conducting arbitrations in Anglo-American jurisdictions whose discovery

125. *Crudens Ltd, Petr*, 1971 SC 64.

126. ICC Award 3540/1980, *Jarvin, et al.*, Collection of ICC Arbitral Awards, 1986-1990, (1994)p.110.

127. ICC Award 5650/1989, in *YCA* (1991) 85

is sometimes considered as extreme. Within the Anglo- American jurisdictions, English judges regard American discovery as the most extreme and English discovery as intermediary.¹²⁸ It is, however, stated that contrary to the fear of non-Americans, discovery procedure in the United States is possible but not quite as common as usually believed.¹²⁹

The courts in the United States normally decline applications for pre-arbitration discovery to take evidence for use in arbitral proceedings such as taking depositions in another state or ordering production of documents in the hands of third parties (by way of subpoena or otherwise). If courts have been reluctant to intervene prior to the constitution of an arbitral tribunal to order pre-hearing discovery, they would show a substantial reluctance to support discovery in arbitration in the way it is pursued in litigation and be even more reticent after constitution when a contractually agreed institution exists to engage in fact-finding and to make the appropriate orders relating thereto. In *Burton v. Bush*¹³⁰, the unsuccessful party sought to set aside an arbitral award on the ground that pre-trial discovery should have been made in similar way to that before the courts. It was held that the parties relinquished the right to certain procedural niceties which were normally associated with a formal trial when they stipulated that disputes would be submitted to arbitration.

Where the arbitration takes place in one jurisdiction and the evidence is to be found in another jurisdiction, the normal way for obtaining letters rogatory would be to ask the arbitral tribunal to request that the court at the seat of arbitration obtain the evidence by issuing letters to a foreign court with which some forms of cooperation for obtaining evidence in civil proceedings exist.¹³¹ Some questions may arise as to whether

128. *Sunderland Steamship P & I Association v. Gatoil Int. Inc. (The "Lorenzo Halcoussi")*, [1988] Lloyd's Rep. 180, p.182.

129. AIJA, ed., *Evidence in International Arbitration Proceedings* (1994), p.288.

130. *Burton v. Bush*, 614 F.2d. 389 (1980)

a party or an arbitral tribunal may *directly* request a foreign court to assist in taking discovery or ordering the production of documents to be used in arbitration, without asking the court at the seat of arbitration to initiate a court-to-court request for cooperation.¹³²

In accordance with Art.27 of the Model Law, the court to which the parties may resort is limited to that of the Model Law country, excluding either assistance to foreign arbitration or requests to foreign courts.¹³³

D. Admiralty Attachment in the United States

1. Generally

As regards forum selection clauses, the Supreme Court in *Bremen v. Zapata*¹³⁴ held that such a clause should be honoured “absent a strong showing that it should be set aside.” The Supreme Court emphasised that “the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.” This decision has had a very strong influence on international litigation before the US courts. Although the clause in *Bremen v Zapata* providing for exclusive foreign jurisdiction is distinguished from an agreement to arbitrate, it is established that the agreement to arbitrate may, in fact, be deemed a specialized kind of forum selection clause.¹³⁵

131. Art.184, Swiss PIL, Art.27 of the Model Law

132. *Fonseca v. Blumenthal*, 620 F.2d. 322 (1980), p.323; *In re Request for Assistance*, 848 F.2d. 1151 (11th Cir. 1988).

133. Holzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*(1989), p.755.

134. *Bremen v. Zapata*, 407 US 1

135. In general, foreign arbitration clauses are but a subset of foreign forum selection clauses. *The Sky Reefer*, 29 F.3d. 727 (1st Cir. 1994)

The enforceability of an arbitration agreement in a maritime contract between two foreign corporations is governed by the New York Convention. In the United States, a number of cases could be found on either side on the matter whether granting the attachment pursuant to section 8 of Chapter 1 of FAA and Rule B (1) of the Supplemental Rules for Certain Admiralty and Maritime Claims¹³⁶ would be inconsistent with the Convention.

The U.S. action *in rem* against maritime property is similar to the action *in rem* in the U.K., Canada and other Common law jurisdictions. Such action is permitted where a maritime lien exists or where a U.S. statute permits.¹³⁷ In general terms, it can be said that Admiralty attachment in the United States is generous to the plaintiff. Maritime liens are recognized as substantive rights and do not require a writ *in rem* to

136. Rule B(1) of the U.S. Supplemental Rules for Certain Admiralty and Maritime Claims reads as follows:

“With respect to any admiralty or maritime claim *in personam*, a verified complaint may contain a prayer for process to attach the defendant’s goods and chattels, or credits and effects, in the hands of garnishee named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant’s knowledge, or to the best of his information and belief, the defendant cannot be found within the district when a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant’s property except for Rule E(8) these Supplemental Rules do not apply to state remedies so involved.”

137. Tetley, ‘Attachment, the Mareva Injunction and saisie conservatoire,’ (1984) LMCLQ 58, p.59. In *Sembawang Shipyard, Ltd. v. M/V Charger and Charger, Inc.*, Sembawang brought an action *in rem* against the Liberian vessel *M/V Charger* and an action *in personam* against the Liberian corporation, Charger, Inc., since Sembawang was never fully paid for its work of repairing *The M/V Charger* in Singapore during a certain period at the Sembawang Shipyard. Plaintiff asserted an alleged maritime lien for the ship repair services and had the vessel arrested. Charger, Inc., posted a corporate bond as security and the vessel was released. Defendant filed a motion to dismiss for lack of jurisdiction and/or for summary judgement. Plaintiff filed a motion to stay proceedings pending arbitration and for the court to retain jurisdiction to enter decree upon the award. The court of the case held that it had jurisdiction over the action by virtue of the Convention as well as under the Supplemental Rule C(1)(6) in combination with section 8 of FAA. It granted the motion to stay proceedings pending arbitration and held that the surety bond should be retained.(U.S. District Court, Eastern District of Louisiana, 23 Aug.1989, in YCA (1990) 660)

be enforced. It establishes jurisdiction in itself and permits the seizure of all the defendants' property in that jurisdiction when the defendant is not to be found there.

2. Denial of Pre-arbitral Attachment

It is argued that the use of maritime provisional remedies is prohibited where an action to stay court action against arbitration agreement and compel arbitration is governed by the Convention, and thus that by seeking an attachment the plaintiff was attempting to 'bypass' the arbitration procedure since attachment serves only as a security device in aid of the arbitration.

As far as the construction of section 8 of Chapter 1 of FAA is concerned, pre-arbitration attachment allowed by section 8 may dissolve the Convention's purposes by discouraging resort to arbitration or by obstructing the course of arbitral proceedings. It is contended that the maritime remedy of foreign attachment pursuant to Rule B(1) of the Supplement Rules may not be utilized solely for the purposes of obtaining security, since the security obtained under such an attachment is incidental to obtaining jurisdiction. Similarly, if, prior to a suit for the issuance of attachment, arbitrators have been nominated, and arbitral proceedings are pending, such action was commenced solely to obtain the writ of attachment to secure the claim in the arbitration pending in a foreign country, and thus an abuse of the process of the court was caused.¹³⁸ Accordingly, it may be contended that an arbitration clause as a *situs* in foreign country is necessarily fatal in the attachment issue. Therefore, admiralty jurisdiction under section 8 was precluded by pending arbitration in a foreign country between the parties, and the Convention implemented in Chapter 2 of FAA prohibited the use of provisional remedies.

138. *Paramount Carriers Corp. v. Cook Industries, Inc.*, 465 F.Supp. 599(SDNY 1979), in *YCA* (1980) 275

3. Permission of Admiralty Attachment

Against the argument denying pre-arbitral attachment, it is submitted that a contract to arbitrate does not necessarily strip the plaintiff of his ability to seek traditional maritime provisional remedies¹³⁹. The reason is that section 8 of FAA (i.e., domestic arbitration in federal cases) expressly provides that a party “may begin his proceedings hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings+.” In fact, attachment had long coexisted with domestic arbitration in most jurisdictions.¹⁴⁰

The prospect of pre-arbitration attachment had yielded neither interference with, nor reluctance to enter into, domestic arbitration, and neither the US Congress nor the courts have perceived any incompatibility between the two.¹⁴¹ A decision permitting attachment would not discourage or hamper arbitration under the Convention.¹⁴² Furthermore, although the attachment under section 8 is issued after an arbitration has been commenced, there is nothing in FAA that suggests that the provisional remedy may not be applied for after commencement of the arbitration.¹⁴³ In the presence of an arbitration agreement “the court may be called upon to enforce the right to arbitrate” or “by preserving the subject matter or assets intact within the jurisdictions thus making

139. *Drys Shipping Corporation v. A/S Falkefjell and A/S Doverfjel*, 558 F.2d. 1050(2d. Cir. 1977), YCA (1979) 328.

140. Boch ed., *Provisional Remedies in International Commercial Arbitration : A Practitioner Handbook* (1994)

141. Section 8 of FAA has expressly reserved the right of an aggrieved party in an admiralty case to employ traditional admiralty law procedures - including arrest of a vessel under Supplementary Rule of the Court - to obtain security for arbitration. Under section 208 which implements the Convention, the provisions of Chapter 1 of the Act are applicable in actions under the Convention to the extent they are not in conflict with the Convention.

142. *Atlas Chartering Services, Inc. v. World Trade Group, Inc.*, 453 F.Supp.861(1978), in YCA (1980) 274

143. *The Paramount Carriers* case, YCA (1980) 275

the(later) award meaningful.”¹⁴⁴ Unless an attachment is found to be in conflict with the Convention, a party with a maritime cause of action may obtain pre-arbitration attachment under the Convention just as it can under Chapter 1 of the Act. As a result, section 8 is no more inimical to the Convention’s design - i.e. to encourage reference of international commercial disputes to arbitral proceedings - than it has been to the long-standing federal policy which is reflected in FAA favouring resort to arbitration of disputes whether or not entirely domestic.

Attachment under section 8 should be available as concomitant security to the aggrieved party without in any way lessening his obligation to arbitrate.¹⁴⁵ Therefore, the retention of jurisdiction under section 8, pending arbitration, is not in any respect inconsistent with the New York Convention or its implementing legislation “notwithstanding the *McCreary* court’s suggestion to the contrary.”¹⁴⁶

144. *Andros v. Andre*, YCA (1978) 293, p.295; *Construction Exporting Enterprises, UNECA v. Nikki Maritime Ltd.*, 558 F.Supp. 1372(1983), in YCA (1984) 486. The court of the *Nikky* case where an attachment of Hull insurance proceeds was sought for the security of enforcement of an award of arbitration in London, the attachment order was granted by the US court, observed that a contractual provision for arbitration abroad, standing alone, scarcely precluded resort to the US courts or, concomitant, invocation of section 8.

145. Just as section 8 of the FAA preserves the right of maritime attachment without waiving the attaching party’s right to arbitration, the attempts to obtain prejudgment security do not construe waiver of his right to have the RICO claim arbitrated. See *Valero Refining, Inc. v. Trade and Transport, Inc.*, 813 F.2d. 60 (5th Cir. 1987), AMC 1987, p.2100 *et seq.*, YCA (1988) 138.

146. *Andros Compania Maritima S.A. v. Andre & Cie, S.A.*, 430 F.Supp. 88(SDNY 1977), in YCA (1978) 293; In *E.A.S.T. Inc. v. M/V Alaia et al and Advance Co.,Inc.*[876 F.2d.(5th Cir.,1989) pp.1168-1178, in YCA (1990), 555], EAST filed an *in rem* action to compel arbitration under a charter party and was successful in arresting the vessel for securing any arbitral award. One of the issues before the court of the case was whether maritime lien, if it could arise, should be retained for the security of a foreign arbitration. The District Court ordered each of the parties to post a security for arbitration, ordered the parties to proceed to arbitration in London, and retained jurisdiction for purposes of enforcing any arbitration award. The Court of Appeal affirmed the lower court’s decision for the main reason that the arrest of a vessel prior to arbitration was not inconsistent with the Convention. In the case, the decision of the *McCreary* case, 501 F.2d.1032 (3rd Cir. 1974), is distinguished on the reason that the plaintiff in the *McCreary* case had sought actively to avoid arbitration by initiating state court proceedings by attaching the defendant’s property.

E. English *in rem* jurisdiction

1. Arrest of Ship and s.12(6) of Arbitration Act of 1950

In England, the Admiralty Court has jurisdictions both *in personam* and *in rem*.¹⁴⁷ The security obtained in an Admiralty proceeding *in rem* customarily assumes the form of an arrested maritime res, namely ship, cargo or freight, or bail or some other security given either to preclude the arrest of a maritime *res* or to secure its subsequent release from arrest. In an action *in rem*, therefore, a claimant with a statutory right *in rem* becomes a secured creditor.

The arrest of a ship or other maritime property in an Admiralty action *in rem* involves the detention of the ship by the Admiralty Marshal subject to the directions of the Admiralty Court in judicial proceedings to secure a maritime claim.¹⁴⁸ The plaintiff taking an action *in rem* must put up security for the Marshal's expenses in connection with arrest and custody. The cost may be considerable.

The action *in rem* gives the court jurisdiction to deal with the claim on its merits.¹⁴⁹ While a ship is under arrest, or the proceeds of sale of a ship are in court, the

147. In England, the means by which the judicial arrest of a ship has been obtained is by the commencing of an action *in rem* and the issue, by the court in that action, of a warrant of arrest. The form of the writ in an Admiralty action *in rem* is one which describes the action as an action *in rem* against the ship but which also refers to parties as plaintiffs and defendants. Unless and until anyone appears to defend an action *in rem* the action proceeds solely as an action *in rem* and any judgment given is solely a judgment given against the *res*. The normal principle of law is that when a judgment is given by an English court the original cause of action no longer exists; it is merged in the judgment. As regards arbitration awards, it has long been the law that an award is a bar to a fresh action, even though it has not been satisfied. It is of the character of proceedings *in rem* that they are not alternative to proceedings *in personam*. The cause of action *in rem* does not merge with a judgment *in personam* given in respect of a cause of action *in personam* arising from the same factors. An *in rem* writ is determinative and conclusive as against all the world in respect of the rights in the *res* but does not create any rights that are enforceable *in personam*. See, The "World Star", [1986]2 Lloyd's Rep.274 ; The "Jalamatsya" [1987]2 Lloyd's Rep.164; Brice, 'Maritime Claims: The European Judgments Convention,' (1987) LMCLQ 281, p.295.

148. *Baltimar v Nalder*, [1994]3 NZLR 129

the action continues as an action *in rem*. If service of the writ has been acknowledged, the action continues also *in personam*. But if a ship is not arrested, or is released after arrest, there is no *res* against which the plaintiff, or any other interested person, can proceed.¹⁵⁰

The idea of security for the satisfaction of an arbitration award is not a novel concept. It is always open to the parties to agree upon the provision of such a security, and the rules under which institutional arbitrations are conducted often provide for such a security. In principle and practice, the parties may expressly vest an arbitrator with the power to demand such a security and by the Arbitration Act 1950, s.12(6)(f), the High Court has a power to make an order “securing the amount in dispute in the reference”. A similar order could presumably also be made under the Arbitration Act 1979, s.5.¹⁵¹

It may be submitted that since the English court has power to grant a Mareva injunction ordering a master not to take his ship out of the jurisdiction, so equally the courts may order the arrest of the ship. Just as the jurisdiction of the English courts is differentiated between matters of *in rem* and *in personam*, however, there are many fundamental differences between an injunction, which is an order directed to the owners and master of the ship not to take a ship out of the jurisdiction and an arrest by which the Admiralty Marshal takes custody of the ship. Although section 12(6)(f) of the Act of 1950 refers the power of the court to the power given by certain rules of court, it is established that the power referred to has nothing to do with the arrest of a ship by the court in an Admiralty action *in rem* or otherwise. The miscellany of procedural powers

149. Internationally, however, arrest proceedings do not of themselves involve a determination of the merits of the dispute as between the claimant and the owner of the *res*; those merits can be determined in any court of competent jurisdiction. See, *The Senner (No.2)*(H.L.(E.)) [1985]1 WLR 490.

150. *The Abidian Daver* [1984]1 AC 398,[1984]1 Lloyd's Rep. 339

151. The purpose of s.5 is to assist an arbitrator, not to influence him, to do justice by exercising his own discretion as to how he should use his overall powers. See, *Waverley S.F.Ltd. v.Carnaud Metalbox Engineering plc.*, [1994]1 Lloyd's Rep. 38, p.43, *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission*, [1994]1 Lloyd's Rep. 45

listed in s.12(6) of the 1950 Act is designed to assist the process of arbitration when the arbitrator himself does not have the power to make an appropriate order. Thus, s.12(6) of the 1950 Act does not give the court power to arrest a ship.¹⁵²

2. Security for Claims and Mandatory Stay of Action

Under the general maritime law an Admiralty proceeding *in rem* and an arbitration proceeding are quite distinct legal phenomena. The only common denominator is that it is open to the parties in dispute to prosecute a maritime claim either in the Admiralty Court or by reference to maritime arbitration.¹⁵³ The reason is that the mere fact that the dispute between the parties falls within the scope of an arbitration agreement entered into between them does not of itself generally preclude one of them from bringing an action.

The arbitration agreement can, however, have certain consequences. If an action is begun, the other party may apply for a stay of proceedings. Generally speaking, the English court's power to grant a stay in such a case is discretionary, though of course in cases falling within s.1 of the Arbitration Act of 1975, the court is bound to grant a stay.¹⁵⁴ Thus, if a party actively pursues proceedings in respect of the same claim both in the court and in arbitration, his so proceeding may be regarded as vexatious and an abuse of the process of the court; if so, the court may, in the exercise of its inherent power, require him to elect in which forum he will pursue his claim.

Whereas the 1975 Act does not provide that the court has power to retain a security obtained *in rem*, equally, it does not expressly confer a power to impose terms when granting a stay under s.1(1).¹⁵⁵ The question of a court's authority over the

152. *The Golden Trader* [1975] QB 348, p.359; *The "Tuyuti"*, [1984] 2 Lloyd's Rep. 51

153. Thomas, 'Admiralty Security and the Arbitral Process,' (1983) LMCLQ 495, p.497.

154. The function of a stay of proceedings under s.1(1) of the 1975 is to give effect to the arbitration agreement; only in so far as it is necessary for that purpose should the proceedings be stayed.

155. Section 11 of the English Bill of Arbitration, however, provides that security may be retained.

security associated with a stayed action *in rem* has been considered against the backdrop of certain fundamental premises associated with the inter-relationship between an action *in rem* and an arbitral proceeding.

In relation to an action *in rem*, the question arises whether a mandatory stay must be accompanied by an order for unconditional release of the security obtained by the claimant or whether it is open to a court to retain the security or alternatively grant its release subject to a term that an alternative security be provided for the satisfaction of any future arbitration award.

In *The Golden Trader*¹⁵⁶, Dutch plaintiffs made a contract for chartering a vessel from an Irish defendant company and brought an action *in rem* against the vessel and arrested it within the English jurisdiction, alleging breach by the defendants of their obligations under the charter party relating to the seaworthiness of the vessel. When the defendants sought an order for stay of proceedings in the action by reason of the existence of an arbitration agreement, a question arose whether the arrest of the ship should continue or be brought to an end where the stay should be mandatory. The court of the case decided to release the vessel. The reason is that there was no statutory basis for retaining the arrest of the vessel in case of the existence of an arbitration agreement.¹⁵⁷ Another question follows from this decision, whether the limitation inherent in the Arbitration Act 1975 is nonetheless capable of being circumvented by reference to a discretion vested in the court.

In *The Rena K*¹⁵⁸ Mr. Justice Brandon pointed out that a claimant who obtained an award in an arbitration was not prevented from pursuing his remedy in an action *in rem*. It was for this reason that the judge found it possible to hold that the security obtained by the arrest of *The Rena K* could be retained in case the plaintiffs' award in

156. *The Golden Trader*, [1975] QB 348

157. *Ibid.*, p.359.

158. *The Rena K* [1978]1 Lloyd's Rep. 545, [1979]1 QB 377

the arbitration remained unsatisfied. Accordingly, the mere existence of an arbitration agreement will not of itself prevent a party from issuing a writ, or serving the writ and (in the case of an action *in rem*) procuring the arrest of the ship, or otherwise with the action.

The decision in *The Rena K*¹⁵⁹ has indicated that such kind of consideration as the court will make in its contemplation is the risk of the arbitration agreement becoming inoperative or incapable of being performed, or the danger of any future award's being left unsatisfied. In the discharge of its discretion the Admiralty Court had to choose between the "retention method" and the "alternative security method".¹⁶⁰ Implicit in the decision in *The Rena K*, is the recognition that a stay, unlike a dismissal or discontinuance, is not final in character but may subsequently be removed for good cause.

In *The Vasso*¹⁶¹, the question raised before the court was whether a party, while actively pursuing an arbitration, could insist upon a letter of undertaking given to secure the release of a ship from arrest. In the case, the respondents applied to the Admiralty Court for an order setting aside the arrest and/or the letter of undertaking on the ground that the court had no jurisdiction to arrest a vessel solely for the purpose of providing a party with security for a claim in an arbitration.¹⁶²

159. *Ibid.*, p.406

160. If the risk is foreseen as one appertaining to the performance of the arbitration agreement the appropriate approach would seem to adopt the "retention method". Where the apprehension concerns not the arbitral process but the discharge of any future award, however, the appropriate approach would seem to be to adopt the "alternative security method".

161. The "Vasso" (formerly "Andria"), [1984]1 Lloyd's Rep. 235

162. On this familiar situation involving action *in rem*, it has become settled law in Scotland that the court will grant warrant to arrest on the dependence of an action founded on a contract which includes a valid arbitration clause. In *Motordrift A/S v. Trachem*, 1982 SLT 127, a Norwegian company raised an action in Scotland against an English company whose registered office was in London. The pursuer founded his jurisdiction on the arrestment of funds held by the English company's bankers in Scotland. At that time arrestment of moveable property in Scotland was one of the grounds to establish jurisdiction in the Scottish courts. The English company sought recall of the arrestments obtained on the dependence of the action on the basis that the action

The owners of cargo which had been damaged by waters or contaminated by rust while on board the respondent's vessel *Andria*(renamed *Vasso*) appealed from the decision of Mr. Justice Sheen given in favour of the respondents and holding *inter alia* that there was no jurisdiction to arrest the vessel and that the undertaking would be discharged. The reasoning of the judge at first instance had been that the purpose of the process *in rem* was to provide security for a plaintiff in respect of any judgment which he might obtain as a result of the hearing and determination of a claim; where the purpose of the proceedings was to obtain security for some different claim (e.g. the claim in the arbitration) the Admiralty Court had no jurisdiction to arrest a vessel. The Court of Appeal disagreed with this reasoning.

It must have appeared to the appellants that the arrest of the ship provided their only chance of ensuring that an arbitration award against the respondents would be of any value. The reason is that the *ad hoc* arbitration agreement was not made conditional upon the provision of security by the respondents; and that the respondents were a

was founded on a contract containing an arbitration clause referring disputes between the parties to arbitration and another clause providing that English law would apply. The court held that the pursuers would be entitled to use the arrestment process to enforce any arbitral award in their favour relating to the matters raised in the action and refused to recall the arrestments. In *Svenska Petroleum AB v HOR Ltd.*, 1986 SLT 513, a Swedish company raised an action in Scotland against a company incorporated in the Cayman Islands on the basis of arrestment of the cargo of a ship lying in the Firth of Forth in Scotland. The court took the same view as in *Motordrift v. Trachem* and refused to recall arrestments although an arbitration in terms of the contract was to proceed in England and be governed by English law. In *Mendok BV v. Cumberland Maritime Corporation*, 1989 SLT 192, a Dutch company sued an American company in Scotland for work done under contract and arrested a drilling rig lying in Cromarty Firth on the dependence of the action. The defenders sought recall of the arrestment. They argued that the contract provided for the settlement of disputes by arbitration and consequently that whereas in this case the arbitration had been initiated and was continuing the warrant to arrest was not competent. The court held that the arbitration did not have the effect that the court had no power to order the arrestment and refused to recall the arrestment. In *Rippin Group Ltd v ITP Interpipe SA* (2nd Div) 1995 SLT 831, there were disputes as to whether arrestment were to be recalled because of the existence of an agreement on foreign arbitration. While there was detailed analysis on the question whether sums arrested were pure, contingent, or future in legal principles in Scotland, it was undisputed that Art.9(1) of Sched 7 to the Scottish version of the Model law were consistent with the common law of Scotland before the Act came into force.

one-ship company: if they sold the ship, they could well dispose of the proceeds and so be unable to meet the appellants' claim. In the circumstances, the Court of Appeal reasoned that an Admiralty Court had jurisdiction to arrest, or to maintain an arrest of a ship when the purpose of the plaintiff was simply to obtain security for an award in arbitration proceedings.¹⁶³

In the case, however, the applicants were found responsible for the abuse of the process of the court by failing to state in their affidavit to lead the warrant of arrest that the parties had agreed to arbitrate the dispute and that the arbitration was being actively pursued. The court had thus not been given the necessary information on which it could have exercised its discretion whether to permit the arrest of the vessel. As a result, the Court of Appeal in *The Vasso* upheld the judge's order discharging the security, albeit on quite different grounds.¹⁶⁴

It was held finally that although the only prerequisite to the court's jurisdiction to issue a warrant for arrest was that a writ must have been issued in an action *in rem*, nevertheless the court should not exercise that jurisdiction for the purpose of providing security for an award which might be made in arbitration proceedings.¹⁶⁵ The judgment

163. *The Vasso*, [1984]1 Lloyd's Rep. 235, p.241.

164. In England, it is well established that any applicant who proceeds *ex parte* must make full and frank disclosure to the court and that failure to do so may result in discharge of any order made, even though the facts were such that, with full disclosure the order would have been justified. The decision in *The Vasso* confused matters since it imposed an uncertain and potentially extensive general duty of disclosure on applicants while, in most cases, doing little to protect shipowner, who could in any event quickly protect themselves by giving security or an undertaking or by applying to the court for a release. See, Dockray, 'Disclosure and Arrest of Ships,' (1994) 110 LQR 382, p.386.

165. In *The Varna* [1993]2 Lloyd's Rep. 253, the issue before the court was whether an applicant for a warrant for arrest of a ship was subject to the "golden rule" of *The Vasso* and hence required to make full disclosure of all material facts. The plaintiff cargo owners in *The Varna* sued in respect of claims alleged to arise out of a contract to carry rice from Bangkok to Odessa. A writ *in rem* was issued and a warrant for the arrest of *The Varna* was obtained and executed. The defendant shipowner immediately sought the release of their vessel and applied for an order setting aside the warrant of arrest, arguing that there had been material non-disclosure of facts. The defendants succeeded before the Queen's Bench vacation Judge and (initially) before the Court of Appeal. Neither the attention of the Court below, nor that of the Court of Appeal was

of the Court of Appeal in *The Vasso* predicted that the court's jurisdiction to arrest a ship in an action *in rem* would not be exercised for the purpose of providing security for an award in arbitration proceedings until s.26 of the Civil Jurisdiction and Judgments Act 1982 ("The 1982 Act") which enacted into English law the European Judgments Convention 1968 ("The Brussels Convention"), was brought into force.¹⁶⁶

The question whether the court, when it is bound to grant a stay under s.1 of the Arbitration Act 1975, can nevertheless permit the arrest of a vessel (the point left open in *The Andria*) was subsequently decided by the Court of Appeal in *The Tuyuti*.¹⁶⁷ This case was heavily contrasted with *The Rena K*. In *The Rena K* the question was whether it was possible in the event of a stay of proceedings to retain security that had already

drawn to the highly material circumstances that the rule to which Lord J. Robert Goff's *dicta* in his judgment in *The Vasso* related had been amended by the Rules of Supreme Court which had been effective from January 12, 1987: S.I. 1986, No.2289. As a result, *The Varna* was released from arrest and sailed soon afterwards. On the following day, however, leading counsel for the plaintiffs asked for the case to be restored for further argument. The Court of Appeal accepted this unusual application, heard further argument and held that (i) the "golden rule" only applies to *ex parte* applications for discretionary remedies; while (ii) on the facts, a warrant of arrest was available as of right. The amendment of Order 75, rule 5 persuaded the court in *The Varna* that a warrant of arrest had ceased to be discretionary remedy and had become available as of right in the circumstances prescribed by the rules.

166. The "*Vasso*", [1984]1 Lloyd's Rep. 235, p.242. S.26 of the Civil Jurisdiction and Judgments Act, 1982 came into force on 1 Nov. 1984: SI 1984, No.1553; The "*Bazias 3*", [1993]1 Lloyd's Rep. 101. The primary purpose of the Brussels Convention is to give effect to Art.220 of the Treaty of Rome which provides that "Member States shall, so far as it is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals + the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." and to secure the simplification of finalities governing the reciprocal recognition and enforcement of judgments within the European Communities.
167. In *The Tuyuti* [1984]2 Lloyd's Rep. 51, the cargo-owners issued their writ in the action, and on the same day the cargo-owners' solicitors obtained a warrant for the arrest of the vessel. By the time the writ was issued, she had not yet come within the jurisdiction of the Admiralty Court, and so the writ had not been served, nor had the vessel been arrested. However, solicitors acting on behalf of the shipowner discovered that the writ had been issued. They then voluntarily filed an acknowledgement of service on behalf of the shipowner, although no writ had been served. The agreement to submit the dispute to arbitration was made after the issue of the writ and the shipowner issued a notice of motion, asking for a stay of proceedings.

been obtained, whereas in *The Tuyuti* the question was whether, if a stay of proceedings was ordered, the warrant of arrest should stand unaffected so that it could be executed by the Marshal in the event of the vessel coming within the jurisdiction of the court.

Nevertheless, the difference between the arrest of a ship and the release of a ship did not have any effect. Since the decision of *The Rena K* was applicable, the effect was that a warrant of arrest already issued but not executed as in *The Tuyuti* was not stayed and that security already obtained by the execution of the warrant of arrest or otherwise was not released.¹⁶⁸

F. Preliminary Injunctive Measures

1. Generally

One of the most striking differences between the Anglo- American legal system and the Civil law system is the existence of equity as a distinct body of law in Anglo- American law, and consequently the existence of legal rights and equitable rights, and of legal and equitable remedies. This has given much flexibility to Anglo-American law as well as obscurity and lack of systematic understanding. In general, the principles of equity jurisdiction give relief where there is no remedy or where no adequate remedy is granted by the common law. One of the specific features of equity, which renders its remedial force so effective, is that it acts *in personam*, i.e., the decrees of the courts of equity are enforceable against the person of the defendant by coercive measures,¹⁶⁹ in the last resort by putting him into jail for contempt.¹⁷⁰

168. *The Tuyuti*, [1984] 2 Lloyd's Rep. 51, p.63.

169. The party may be directed to make a deposit or delivery, or to convey real property. His chattels may be taken and deposited or delivered into a place designated by the court of a competence. The party may convey his real property only within the direction of the court. Other person may be appointed by the court so as to perform the act required at the expense of the disobedient party.

170. Szladits, 'The Concept of Specific Performance in Civil Law,' (1955) 4 AJCL 208, pp.208-211.

Among the equitable remedies commonly used in court proceedings involving arbitration are injunctions. The proceedings for injunctions involving arbitration are concerned with the desirability of preserving the *status quo* between the parties until their true legal relationship can be fully investigated at an arbitral proceeding. Besides the purposes of preserving the *status quo*, injunctions may be sought to end disputes. When the court relies greatly on materials available to it at the hearing of the application to find out whether the plaintiff has real prospects for succeeding in his claim for a permanent injunction at the trial, the parties are likely to regard the decision of the court as a form of judgment which they accepted as settling the issue.

In some cases, it might lead to courts promptly making orders on untested and perhaps inadequate affidavit evidence. It is true that the judge cannot be sure on a motion who will succeed. At preliminary stages, it is not generally possible for either party to present their case as comprehensively as they would at the trial. In the *American Cyanamid* case¹⁷¹, it was held that where the balance of convenience greatly favours one party, the grant or refusal of an interlocutory injunction should depend solely on that factor irrespective of the relative strengths of the parties' cases.

Questions whether the court should or should not grant an injunction suggest more intriguing ones when another jurisdiction is concerned due to arbitration. One of the questions involves the situation where all that is sought in one country is an interlocutory injunction to restrain the removal of assets pending the proceedings of an arbitration elsewhere so as to ensure that they can be available to the plaintiffs for execution in the event of a favourable arbitral award.

As an equitable remedy *in personam*, an injunctive order is directed only at the parties named in the order; the defendant is restrained from dealing with his assets pursuant to the order, but the assets themselves are not attached. Where an order for an injunction is not obeyed, a motion should be brought to commit or attach the party in

171. *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396

breach. In the case of a wilfully disobedient corporate party, a writ of sequestration may be sought against the corporation and a writ of attachment against its directors and officers. In addition, any person who had knowledge of the injunction, including a party not yet served with the order, and who aided and abetted in its breach may be liable in contempt for having obstructed the course of justice.

2. English *Mareva* Injunction

a. Bases

An interlocutory injunction in England may be sought to restrain the removal of assets pending arbitration so as to ensure that they would be available to the plaintiffs for execution in the event of a favourable award. The power of the English courts to restrain assets is specifically accepted under s.12(6)(f) of the Arbitration Act 1950¹⁷² and generally under s.37 of the Supreme Court Act 1981.¹⁷³ It is to be observed that in addition to the powers under s.12(6)(f) of the 1950 Act there is also an express power to make an order for an interim injunction under s.12(6)(h).¹⁷⁴

The power of the court under s.37 of the 1981 Act on which a *Mareva* injunction is based serves to prevent the plaintiff obtaining a barren judgment, incapable of enforcement, and maintains the effective jurisdiction of the court over a defendant who is likely to dispose of his assets. The prime object of the *Mareva* procedure is to

172. *The Rena K*, [1979]1 QB 377

173. S.37 of the Supreme Court Act 1981 provides as follows:

“(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so;

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just;

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where he is not, domiciled, resident or present within that jurisdiction.”

174. *The Rena K*, [1978]1 Lloyd's Rep.545, p.561

restrain dealings with assets in order to prevent their being removed from the jurisdiction so as to render a final judgment valueless. The *Mareva* injunction operates *in personam* as any other interlocutory injunction does, to restrain certain actions by the defendant, and not *in rem*, so as actually to attach the goods with respect to which the prohibition operates, even though the *Mareva* procedure is often loosely called "attachment".¹⁷⁵ The procedure for *Mareva* injunction does not have the same effect as an Admiralty action *in rem*, whereby the arrest of a particular asset, a ship, founds jurisdiction and makes the plaintiff a secured creditor. The exercise of the power, therefore, depends wholly on the condition whether there is a proper *in personam* jurisdiction.¹⁷⁶

The key to the *Mareva* jurisdiction is not merely that assets in the jurisdiction are in peril of being removed or dissipated but that there will be no means in or outside the jurisdiction available to compel compliance with the judgment when rendered. Thus, the claimant must prove that there are grounds for believing that there is a risk of the assets being depleted or removed from the jurisdiction and that the subsequent award or judgment would not be satisfied in or outside the jurisdiction.

The *Mareva* injunction is not restricted to intangible property such as a bank account. However large they are, the injunction may be granted against ships and

175. Rose, 'The *Mareva* injunction - Attachment *in personam* - Part 1,' (1981) LMCLQ 1, p.5; Dine and McEvoy, Jr., 'Are *Mareva* Injunctions Becoming Attachment Orders?' (1989) CJQ 236; Ngwasiri, 'Pre-trial Civil Proceedings in England and France : A Comparative Study,' (1991) CJQ 289, p.299.

176. Mercedes-Benz v. Leiduck, [1996] AC 284; [1995]3 All ER 929; [1995]2 Lloyd's Rep. 417; [1995]3 WLR 718. In the case, the Privy Council in the United Kingdom rejected the appeal from the decision of the Court of Appeal of Hong Kong dismissing the plaintiff, Mercedes-Benz AG's appeal against the decision of granting the application of the respondent, Herbert Heinz Herst Leiduck, to set aside the order made by Deputy Judge in the High court giving leave to serve a writ on the respondent in Monaco and granting a *Mareva* injunction over the respondent's assets in Hong Kong limited to assets not exceeding \$US 19 million. Although there are several issues on the powers of the English courts involving *Mareva* injunction, the plaintiff was not successful in overcoming the threshold test of the existence of jurisdiction of the Hong Kong courts to grant *Mareva* relief.

aeroplanes. Where there is a real risk that immoveables may be converted into movables which may be removed out of the jurisdiction, or where perhaps proceeds of sale may be paid outside the jurisdiction, the injunction should be available to prevent that. Since the plaintiff must, therefore, be able to proceed quickly and stealthily, so that the defendant's assets are "blocked" before he has any idea of what is going to happen, he is entitled to apply *ex parte* for an injunction.¹⁷⁷

The right to "due process" *per se* which has troubled the courts in the United States has not arisen in England¹⁷⁸, but the courts have in effect faced the problem by fixing strict criteria for the issue of a *Mareva* injunction and thus balancing the public good against the rights of the individual debtor.¹⁷⁹ The level of proof required for an interlocutory injunction was fixed by the House of Lords in *American Cyanamid v. Ethicon*.¹⁸⁰ A *Mareva* applicant is no longer required to show that he has a strong prima facie case but only sufficient interest in a matter.

The jurisdiction of an English court may also be extended to control wilful evasion of its orders by a judgment debtor even acting through innocent third parties. The jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties.¹⁸¹ Likewise, unqualified *Mareva* injunctions covering assets abroad can never be justified, either before or after judgment, because they involve an exorbitant assertion of jurisdiction of an *in rem*

177. Rogers, 'The Extra-territorial Reach of the *Mareva* Injunction,' [1991] LMCLQ 231

178. The Full Faith and Credit Clause of the United States Constitution requires by its terms that "Full Faith and Credit shall be given in each state to the + judicial proceedings of every other state."

179. Ngwasiri, *op.cit.*, p.299; Tetley, *op.cit.*, p.78.

180. *American Cyanamid v. Ethicon*, [1975] AC 396

181. *Z. Ltd. v. A-Z and AA-LL*, [1982]1 Lloyd's Rep. 240; [1982] QB 558; *Mercantile Group(Europe) A.G. v. Aiyela and Others (C.A.)*, [1993]3 WLR 1116, p.1124; Devonshire, 'The Implications of Third Parties Holding Assets Subject to a *Mareva* Injunction,' [1996] LMCLQ 268.

nature over third parties outside the jurisdiction of English courts, and they are not subjected to the control of the local courts.¹⁸²

b. Free-standing *Mareva* Injunction

In order to accentuate the *in personam* nature of interlocutory injunctions, it is usually pointed out that the injunction is not an independent cause of action, but an ancillary or collateral remedy.¹⁸³ It is a well established law that the jurisdiction of the English High Court to grant injunctions, whether interlocutory or final, is confined to injunctions granted for the enforcement or protection of some legal or equitable right and this rule applies to applications for injunctions involving arbitration proceedings as it does to other injunctions.¹⁸⁴

Where security is sought for a future cause of action - a cause of action which

182. *Derby & Co.Ltd. and Others v. Anthony Henry David Weldon and Others*, [1989]1 LLR. 122, p.127, [1989] NLJ Rep 11, p.13.

183. *The Siskina* [1977]3 WLR 818, [1979] AC 256. In *The Siskina* case, owners of cargo lately laden on board the vessel *Siskina* and others (plaintiffs in the action) sought an interlocutory injunction before the English court for the purposes of restraining the defendants from disposing of any of their assets within the jurisdiction including in particular the insurance proceeds in respect of their former vessel *The Siskina* which sank and became a fatal loss. The issue raised in *The Siskina* case was whether the English court had jurisdiction to grant a *Mareva* injunction where it did not have jurisdiction over the substance of the dispute between the parties. In the leading speech of the House of Lords, Lord Diplock defines the nature of interlocutory injunction which is ancillary to the cause of action from that of the cause of action "arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court." Since the jurisdiction of the English court over persons is territorial and the exercise of the exorbitant power under R.S.C., Ord.11 requires great caution, it was decided that the court did not have any jurisdiction over the case in which the cargo-owners had no legal or equitable right or interest in the insurance moneys payable to the shipowner in respect of the loss of *The Siskina*, which was enforceable in England by a final judgment of the High Court. The crucial point of the case is that the right to an interlocutory injunction is dependent on a pre-existing cause of action. This principle was maintained in *British Airways v. Laker Airways* [1984]3 WLR 413, p.435, and *Veracruz Transportation Inc. v. C.Shipping Co. Inc. and Den Norske Bank A/S (The "Veracruz 1")*, [1992]1 Lloyd's Rep. 353

184. *Compagnie Europeene De Cereals S.A. v. Tradax Export S.A.*, [1986]2 Lloyd's Rep. 301; Verheul, 'The Forum(Non) Conveniens in English and Dutch Law and Under Some International Conventions,'(1986) ICLQ 413, p.420.

will give rise to entitlement to monetary relief, that would be contrary to a long line of authority which says that s.37 is to be used in support of an existing legal or equitable right.¹⁸⁵ Whereas a creditor in a foreign country need not have a suit in contemplation when he applies for the seizure of his debtor's assets, the *Mareva* injunction requires that the plaintiff establish the English court's jurisdiction in respect of his claim. In accordance with the decision of *The Siskina*, a plaintiff cannot obtain *Mareva* relief when the substance of the claim is to be determined in a country which is not a party to the Brussels Convention and the Lugano Convention, and he cannot obtain *Mareva* relief when his right of action is imminent (and even inevitable) but not yet accrued.¹⁸⁶

In the *Channel Tunnel* case English defenders had argued that the English court had no jurisdiction to grant an injunction against them. The reason was that there was an arbitration clause, they were entitled to a mandatory stay, and consequently the final relief would be granted by the arbitrators and not by the court. Accordingly, the injunction did not satisfy Lord Diplock's test in *The Siskina* that the relief sought must relate to the invasion of a legal or equitable right "enforceable here by a final judgment for an injunction."

With regard to the famous speech by Lord Diplock, Lord Browne-Wilkinson opined that the third condition of the principle of *The Siskina*¹⁸⁷ does not apply to the power to grant interlocutory injunctions since it will be impossible, at the time of the interlocutory stage, to say whether or not the substantive proceedings and the grant of

185. *Steamship Mutual Underwriting Association (Bermuda) Ltd. v. Thakar Shipping Co. Ltd.*, [1986]2 Lloyd's Rep. 439, p.440.

186. L.Collins, 'The Legacy of *The Siskina*,' (1992) LQR 175, p.180.

187. The conditions of the principles of *The Siskina* are described by Lord Browne-Wilkinson as follows:

"(1) that the court must have personal jurisdiction over the defendants in the sense that they can be duly served either personally or under Order 11 (other than sub-rule (i)); and (2) that the plaintiffs have a cause of action under English law ; and (3) that the interlocutory injunction must be ancillary to a claim for substantive relief to be granted in this country by an order of the English court." See, *The Channel Tunnel* case, [1993]2 WLR 262, 266.

the final relief will or will not take place before the English court, and furthermore cases where there is a real doubt whether the English court or some foreign court is the *forum conveniens* for the litigation are uncertain. The Lordship concluded that the court has power to grant interlocutory relief based on a cause of action recognised by an English court against a defendant duly served where such relief is ancillary to a final order whether it should be granted by the English court or by some other court or arbitral body.¹⁸⁸

In the *Mercedes-Benz* case¹⁸⁹, some historical points were thoroughly debated in the judgment of the Privy Council by Lord Mustill who led the judgment and Lord Nicholls who delivered a dissenting opinion. It has been shown historically that there was no 'cause of action' for *Mareva* relief sought on its own with the result that neither equity nor the common law allowed it.¹⁹⁰ This has not been changed since the legislation of section 37 of the Supreme Court Act of 1981. Based on this historical background, the defendant was successful in arguing that such history made the application by the plaintiff unacceptable to grant.

In the *Mercedes-Benz* case, Lord Mustill and Lord Nicholls agreed that it is important to distinguish two different questions, one of which is the question of territorial jurisdiction, and the other of which is the question of subject-matter jurisdiction. In their approaches to these questions, their lordships disagreed as to

188. *Ibid.*, p. 267.

189. *Mercedes-Benz v. Leiduck*, [1995]2 Lloyd's Rep. 417 The facts of the case were that the plaintiff had brought proceedings in Monaco against the defendant, a German citizen. For the purpose of protecting the enforceability of ultimate judgment that they might obtain in those proceedings, the plaintiff also brought proceedings against the defendant in Hong Kong where it was known that the defendant had assets. In the Hong Kong proceedings the plaintiff applied *ex parte* for a worldwide *Mareva* injunction and for leave to serve the writ on the defendant out of the jurisdiction. This application was granted but on the defendant's *inter partes* application the order was set aside. The plaintiff's further appeal to the Judicial Committee of the Privy Council was dismissed.

190. Gee, 'Mercedes and *Mareva*,' (1995) SJ 1076

whether the inquiry should start with the former or with the latter question.¹⁹¹ Lord Mustill said that the question of territorial jurisdiction should be considered first, for, if the defendant cannot properly be brought before the court, the latter question will not arise. Lord Nicholls, on the other hand, said that the question of subject-matter jurisdiction should be considered first because until it has been given a full answer the former question cannot be addressed.

According to the speech by Lord Mustill, even if it can be assumed that a *Mareva* injunction can stand free from the principles of *The Siskina* case, provisions of Ord.11, r.1(1) would not entitle the court to permit the service of the writ or other originating process claiming the *Mareva* relief on the foreigner out of the jurisdiction. The reason is that the foreigner will be forced to choose between suffering a judgment in default or appearing before the court which has no other jurisdiction over him so as to argue that his assets should not be influenced by such relief.

In accordance with the dissenting opinion by Lord Nicholls, the courts of Hong Kong are able to exercise their wide power to grant a *Mareva* injunction in similar terms to s.37(3) of the Supreme Court Act 1981 in England. It is emphasised that *Mareva* relief is granted to facilitate the process of execution or enforcement which will arise when a monetary judgment of a certain amount has been obtained, and that such relief is to be available easily before the Hong Kong court as much as before English courts. So far as the relationship between the power of the court to grant *Mareva* relief and the principles of *The Siskina* case is concerned, the new environment where *Mareva* relief is considered necessary in aid of anticipated foreign judgment is urging the court to exercise its power to grant injunctions so as to prevent injustice.

It is contended that *The Siskina* principles should be rectified since the underlying cause of action should be taken into account as a factor in considering the discretionary power of the court which is different from the question of the existence of

191. Practice and Procedure, 'Extra-territorial Jurisdiction and *Mareva* Relief,' (1996)15 CJK 6, p.7.

the jurisdiction. In the particular circumstances where the anticipated judgment will be recognised and enforceable in Hong Kong, it is considered reasonable and sensible of the court of Hong Kong to grant the application by the plaintiff for *Mareva* injunctions.

As far as the character of interim relief is concerned, the *Mareva* relief in the case is the same as discussed in the *Channel Tunnel* case.¹⁹² It is in the other proceedings that the substantive issue between the parties will be determined. The court which grants the interim relief is doing no more than regulate meanwhile the defendant's acts or omissions within its territorial jurisdiction.

All the members of the Board with the exception of Lord Nicholls, however, agreed that the intention of Ord.11, r.1 is not to give the court an extra-territorial jurisdiction only for the reason of the presence of assets within the territory. It is probable that the court might have considered that it should await an Order in Council by section 25(3) of the Civil Jurisdiction and Judgments Act 1982 before it starts reconsidering its reasoning in *The Siskina*. Although section 25(3) shows that Parliament does not approve the jurisdictional limitation imposed by *The Siskina*¹⁹³, the same provision might have the effect of restraining the court from extending its jurisdiction.¹⁹⁴

3. Restraining Injunctions and Foreign Proceedings

Where there are arbitration proceedings against the wishes of one of the parties, the party may consider various courses of action. Amongst the actions are injunctions by the competent courts. In most cases it is a court of the place of residence of one of the parties which, at the request of the party to the arbitration, orders the other party and/or the arbitrators, and/or even an administering body such as the ICC Court of

192. *Mercedes v. Leiduck*, [1995]2 Lloyd's Rep.417, p.432

193. *Republic of Haiti and Others v. Jean-Claude Duvalier and Others*, [1989]1 Lloyd's Rep. 111

194. Case and Comment, '*Mareva* Relief Cannot Stand Alone: Further Judicial Reflections Upon *The Siskina* Doctrine,' [1996] CLJ 12, p.13.

Arbitration to interrupt arbitral hearings while waiting for a decision to be made by the court. The aggrieved party may also instigate his entitlements under the law of the place where the offending legal proceedings have been instituted, or under the law of any other country to which he has access.¹⁹⁵

In an ICC case in which there were disputes between the parties to an international construction contract, the employer defended the Request for Arbitration by the contractor made to the ICC on the basis that the Request was time-barred in accordance with the laws of Yemen because of provisions on prescription in Yemen law. On the same reasoning, the employer sought an injunction from a court in Yemen.¹⁹⁶

Where there are proceedings before the court in breach of an arbitration clause, the party may proceed with arbitration irrespective of such proceedings. It is the arbitral tribunal which decides the effect of the court proceedings. In an ICC case, the tribunal made an award against the defendant who had initiated court proceedings for the purpose of getting an injunction from the court of his country so as to prevent arbitration from proceeding.¹⁹⁷

It would probably be convenient for the party wishing arbitration to restrain what was being done in foreign courts by means of an injunction sought before the court of the place of arbitration.¹⁹⁸ If the plaintiff in the foreign proceedings had no

195. Japan Educational Corporation (Japan) v. Kenneth J. Feld (US), High Court, Tokyo, 30 May 1994, YCA XX(1995), Japan No. 6. In the case, the Japanese parties were ordered by the District Court in New York City not to proceed lawsuit in the Tokyo District Court and directed to submit their claim to ICC arbitrators sitting in New York. Their attempts to block the injunction were not successful in the proceedings before the Tokyo District and High Courts which based themselves on Art.7(2) of *Hourei*. Art. 7(2) of the Law Concerning the Application of Laws in General (*Hourei*) provides that unless the intention of the parties is certain, the law of the place where the act is done shall govern.

196. ICC Award Case No. 4862/1986, Jarvin, *et.al.*, *Collection of ICC Arbitral Awards, 1986-1990*, (1994) p.508.

197. ICC Award Case No. 1512/1970, Jarvin and Derains, *Collection of ICC Arbitral Awards 1974-1985*(1990), p.37.

198. Irish Shipping Ltd. v. Commercial Union[1990]2 WLR 117; Jacob, 'Choice of Appropriate Court - Forum non conveniens.' (1987) CJQ 89; Kaye, *Private International Law of Tort and*

ground whatever for making any claim against the defendant - and nevertheless instigated the action before a foreign court - the court of the place of arbitration might grant an injunction to prevent the continuance of the foreign proceedings. Alternatively, in lieu of an injunction, the court may award damages against him for proceedings in a foreign jurisdiction in breach of the arbitration clause.

Where a foreign national not carrying on business within the jurisdiction of the court was involved, the fact that the parties had agreed to submit disputes to arbitration in a given place amounted either to a sufficient submission to the courts of the place of arbitration or, alternatively, the creation of a sufficiently close nexus between them and the jurisdiction of the court to entitle the court to exercise that jurisdiction so as to grant an injunction for restraining foreign litigations.¹⁹⁹ In principle, by an injunction, the court of the place of arbitration does not restrain the foreign court from hearing the action brought before it, but the party from bringing the action in the foreign court.²⁰⁰ If an injunction were granted against the party, he would obey it.

A mandatory injunction takes the form of a judgment or order of the court requiring a person to do a specified act within a specified time. An interlocutory injunction in a court action is an order made before the trial and it takes effect immediately until a specified time or until the trial. The conjoining of an interlocutory injunction with a mandatory injunction for the purpose of restraining foreign court

Product Liability (1991), p.31; Notes by Baer, 'Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach,' (1984)37 Stanford L.Rev. 155; Case Notes by O'Brien, 'Smith, Kline & French Laboratories Ltd and Smith Kline Corp. v. Bloch,' (1983) 15 Law & Pol'y Int.Bus. 635; Robertson, 'Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction', (1987) LQR 398.

199. *Tracom v. Sudan Oil Seeds*, [1983]1 WLR 1026, [1983]1 WLR 1026 ; *Seaconsar Far East Ltd v. Bank Markazi Jomhuri Islami Iran*, [1994]1 AC 438, [1993]3 WLR(H.L.) 756; *Continental Bank v. Aeakos S.A. (C.A.)* [1994]1 WLR 588; Bell, 'Anti-suit Injunctions and the Brussels Convention,' (1994) LQR 205.

200. *World Pride Shipping Ltd. v. Daichi Chuo Kisen Kaisha (the "Golden Anne")*, [1984]2 Lloyd's Rep. 489

action in breach of arbitration agreement inevitably, therefore, presents great difficulties, since it would seem to envisage that a party may be required to do a specified act within a specified time before the trial.²⁰¹

Most national courts in Common law countries enjoy an inherent power to restrain through the agency of prohibitive injunctions the prosecution of legal proceedings in a foreign court brought in breach of an agreement to arbitrate.

As a threshold test for the exercise of the discretion, the question should first be established that there is a serious question to be tried; or in other words, whether the plaintiffs have any real prospect of succeeding in their claim for a permanent injunction at the trial.²⁰² The next question is whether the balance of convenience should be in favour of granting or refusing the interlocutory relief which is sought.²⁰³

In *The Lisboa* case²⁰⁴, it was disputed whether the plaintiffs were entitled to an interlocutory injunction restraining the cargo-owners from proceeding with the arrest of the vessel *Lisboa* and a mandatory injunction releasing the vessel in Italy from arrest, despite the fact that there was an exclusive jurisdiction clause in the bill of lading giving the English courts exclusive jurisdiction. The question was whether the arrest of the vessel was so vexatious and oppressive that the defendants ought to be ordered by mandatory injunction to release her. The court in the case found that the only purpose in the case in arresting the vessel was to provide security in the event of the defendants succeeding in the English proceedings. In the circumstances, although the English court

201. Jacob, 'Interlocutory Mandatory Injunctions,' (1986) CQJ 186

202. Perkins, 'A Good Arguable Case about What?' [1994] CLJ 244.

203. *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396, [1975]2 WLR 316; In a similar way, the balance of hardship test is generally accepted in US Federal Courts. In *Teradyne v. Mostek*, 797 F.2d. 43, 47-51 (1st Cir. 1986), the court observed that "The court must find : (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the intent will not be adversely affected by the granting of the injunction."

204. The "*Lisboa*", [1980]2 Lloyd's Rep. 546, p.549.

of the case had jurisdiction to restrain a party to English proceedings from proceedings in a foreign court, the court decided to exercise it with great caution especially when the defendant to the English proceedings was plaintiff in the foreign proceedings. Thus, when the arrest is made in good faith, *i.e.*, for the purpose of obtaining security for a just demand, the English courts would neither restrain it by injunction, nor grant an injunction so as to compel the release of the vessel, even though it is said to be in breach of an exclusive jurisdiction clause; nor would they award damages for the breach of such a clause.

4. Interlocutory Injunction in aid of International Arbitration

The supervisory role of the courts needs to be distinguished from their supportive role. As regards court supervision, while there must be conflicting supervision of the relevant courts if the courts of more than one country seek to exercise jurisdiction over an arbitration, the same problems do not necessarily arise in relation to the courts' supportive role. In certain situations the contributions made by the courts of more than one country are complementary rather than conflicting. Unlike supervisory power over the conduct of arbitration which is considered as intervening, the power for supportive or protective measures is generally recognised. For instance, the purpose of interim measures of protection is regarded as not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of dispute. Therefore, the effectiveness of the arbitral process depends on the support of all national courts, not just the courts of the seat of arbitration.²⁰⁵

When the parties are in urgent need of power from the courts rather than an arbitral tribunal agreed so as to resolve their disputes, the courts are likely to exercise

205. Hill, 'The Jurisdiction of the Courts to Grant Interim Measures in Support of Arbitration Proceedings,' [1992] LMCLQ 310, pp.315-316.

their powers to grant provisional measures. Since the courts have compulsory powers over subjects within their own jurisdiction, provisional measures in the form of injunctions prove effective in preventing third parties from doing certain acts.

In the *Rockwell v. Citibank* case²⁰⁶, the Federal Court in the United States affirmed a preliminary injunction over the opposition of Citibank which was granted by the United States District Court for the Southern District of New York so as to prevent the third party banker from making payment of certain standby letters of credit in favour of Iranian banks. The plaintiff, an American company, which was pursuing its claim before Iran-US Claims Tribunal sitting in The Hague, successfully argued before the courts that some indiscriminate demands by Iranian banks for payment under standby letters of credit constituted fraudulent transactions.

International law does not generally prohibit a state from extending the application of its laws and the jurisdiction of its courts to persons, conduct, actions and property outside of its territory as long as the bases for the exercise of jurisdiction are reasonable.²⁰⁷

The international interlocutory injunction, an instrument by which a court of one jurisdiction seeks to restrain the conduct of parties in an arbitration which is to be held in another jurisdiction, has many common features with foreign attachment. That interlocutory injunctions are addressed to private persons within the jurisdiction of the enjoining court (operating against them *in personam*), rather than directly to the foreign court or arbitral tribunal whose proceedings are at issue, does not subsequently lessen the element of conflict.²⁰⁸

The extraterritoriality of municipal law in aid of foreign arbitration always

206. *Rockwell Int. Systems, Inc. v. Citibank, N.A.*, 719 F.2d.583 (2d Cir. 1983)

207. Castel, *The Extraterritorial Effects of Antitrust Laws*(1983) Hague Recueil, 21, p.26.

208. Bermann, 'The Use of Anti-Suit Injunctions in International Litigation,' (1990)28 Colum.J.Trans.L. 589

brings the risk of infringing the sovereignty of other states and may violate international law. Such intervention strongly implies - and often actually creates - jurisdictional conflict with the jurisdiction of the arbitral tribunal as well as that of the court of the place of arbitration. The jurisdiction of interlocutory injunction is, therefore, to be exercised with great caution so as to avoid even the appearance of undue interference with another court.²⁰⁹

Given that the power of the court is limited within its jurisdiction, where the governing law of the original agreement to arbitrate in a foreign country was without doubt a particular national law such as the English Arbitration Act of 1950, the whole of the national law was understood not to apply to an arbitration which was from the outset designed to take place abroad. The reason is that the whole application of the national law would definitely bring potential conflict with the powers exercisable by the local court of the place of arbitration.²¹⁰ In the converse case, where parties arbitrate in England but agree on the procedural law of a foreign country, the law is only effective within the limit of English law.²¹¹ It is to be recognised that procedural questions would fall to be decided by the law of the place of arbitration as the *lex fori*, and also by the law which the parties had agreed should govern the reference.

In the *Channel Tunnel* case²¹², the contract between the parties provided that there should be a two tier system for settling disputes between themselves: firstly,

209. *Qatar Petroleum v. Shell*, [1983]2 Lloyd's Rep. 35, p.43; *South Carolina Co. v. Assurantie N.V.* [1987] AC 24, [1986]3 All ER 487, [1986]3 WLR 398, p.408.

210. *Black Clawson International Ltd. v. Papierwerke Waldhof - Ashcaffenburg A.g.* [1981]2 Lloyd's Rep. 446, p.453. In *Interbulk (Hong Kong) Ltd v. Safe Rich Industries Ltd*, the court held that, pursuant to s.14(6) of the Arbitration Ordinance Hong Kong, which is almost the same as s.12(6) of the Arbitration Act, 1950, courts had no jurisdiction to grant interim relief, in cases where there was a valid arbitration agreement providing for arbitration elsewhere than in Hong Kong (Hong Kong: High Court of Hong Kong (Barnett, J.), 2 March 1992, CLOUT case 42, YCA (1994) 273).

211. *Union of India v. McDonnell Douglas* [1993]2 Lloyd's Rep. 48.

212. The *Channel Tunnel* case, [1993] AC 334

reference to the panel of experts; secondly, to arbitrators. If either party was dissatisfied with any decision of the panel, it was able to refer the dispute to arbitration under ICC Rules, with a seat in Brussels.

A dispute arose as to the amounts payable in respect of the work on the cooling system, and by letter the defendants threatened to suspend that work, alleging that the plaintiffs were in breach of contract. They issued a writ seeking an injunction to restrain the defendants from suspending the work on the plaintiffs' application for an interim injunction. The main issues before the English courts were whether they had power to grant an injunction where the arbitration was to take place abroad, and whether it should be exercised if there was such a power.

It was held by the court of first instance that the trial judge would be inclined to grant an injunction against the defendants, but made no order on the defendants' undertaking to give notice of any suspension of works by the defendants. The judge also dismissed a summons by the defendants to stay the plaintiffs' action in favour of arbitration under section 1 of the Arbitration Act 1975. The plaintiffs appealed the decision before the Court of Appeal. The Court of Appeal held that, whether as a matter of jurisdiction or discretion, the English courts were never entitled to order interim measures in relation to a matter which the parties had agreed to refer to arbitration abroad.²¹³ Although many of the main points delivered by the Court of Appeal were reiterated in the leading judgment of the House of Lords, the House of Lords stood on different reasons of refusing to exercise its power to grant interlocutory injunction in aid of foreign arbitration.

The most striking points were made in relation to the construction of section 37 of the Supreme Court Act 1981. It was held that foreign elements do not have the effect of reducing the power of an English court.

Accordingly it does not follow that even in a situation where, if section 12(6)

213. The *Channel Tunnel* case, [1992]2 WLR 741, pp.757-759.

applied to the arbitration in question, the court would be justified in making an interim order under section 12(6)(h), the court would be equally justified, or would even have the power, to do so under section 37(1).²¹⁴ The court contemplated that in the arbitration agreement and the New York Convention which was given effect by the enactment of the English Arbitration Act of 1975 there was nothing to prevent the court from exercising the power of municipal law, which was not available from the arbitrators, in order to ensure that the arbitration was carried forward to the best advantage.²¹⁵

Nevertheless, the court found that the interim character of the injunction claimed became illusory since the parties had already set up the dispute settlement measure agreed between themselves at the time when the case was brought before the House of Lords. The court reasoned further that the injunction claimed from the English court was the very injunction sought before the panel and the arbitrators, except that the former was described as interlocutory or interim. When there is a race between the arbitral tribunal and the courts with regard to assessment of disputes, it was held that the court should respect the choice of tribunal which the parties had made, and should not usurp the function held by the arbitrators of making decisions for which the parties had entrusted a power of decision to them alone.²¹⁶

G. Security for Costs and International Arbitration

1. Generally

The economy of arbitration is a function not only of innate characteristics of arbitral forum and process, but also of the nature of the subject matter of dispute and of the spirit with which parties and their representatives come to the arbitral process. It is

214. The *Channel Tunnel* case, [1993]2 WLR 262, p.283.

215. *Ibid.*, p.289.

216. The ICC International Court of Arbitration, *Conservatory and Provisional Measures in International Arbitration* (1993), p.118.

typical that an award will be composed of two portions: a substantive part and that which deals with costs. The idea of costs is an entire and homogeneous concept, although in English arbitral practice it has long been customary to distinguish between the costs of the reference and the costs of the award.²¹⁷ The distinction made in English practice derives from the possessory lien enjoyed by an arbitrator over the award as security for payment of his remuneration and expenses. In consequence, the usual form is for the parties to pay the arbitrator directly and for the arbitrator to retain possession of the award until a party comes forward to take it up and tender the necessary payment.

Who is to bear the costs of an arbitration is a question as relevant as the corresponding question in civil litigation.²¹⁸ With regard to questions of costs the *prima facie* rule is that costs follow the event.²¹⁹ The import of the rule is that a successful party in an arbitration should receive his costs, whether the successful party may be claimant or respondent.²²⁰ But, the general rule has a deceptive innocence, and in many circumstances it serves only as a general indicator of the way an arbitrator's thinking ought to be directed.²²¹

In general, the costs of arbitration include the fees and necessary expenses of arbitrators, administrative bodies, experts and other witnesses, which may be dependent on the mode of arbitration.²²² Costs of legal assistance for the parties can be included in

217. Section 18 (1) of the English Arbitration Act 1950, Thomas, 'Costs, Discretion and Issues of Technical Misconduct,' (1982) LMCLQ 288, pp.289-290.

218. In principle, the costs of arbitration, including but not limited to the arbitrators' fees are borne by the unsuccessful party. Apart from the costs of the arbitration, the successful party claims the 'normal legal costs' incurred by him, in accordance with Art.20.2. of the ICC Rules (ICC Award 5460/1987). See also, Art.40(2) of UNCITRAL Rules.

219. Ceval Alimentos S.A. v. Agrimpex Trading Co. Ltd., [1995]2 Lloyd's Rep. 380

220. ICC Final Award in case no. 6248 of 1990, YCA (1994) 124, ICC Final Award in case no. 6289 of 1992, YCA (1994) 167, ICC Final Award in Case no. 6962 of 1992, YCA (1994) 192

221. Thomas, *op.cit.*, p.295.

222. Schneider, 'Lean Arbitration: Cost Control and Efficiency Through Progressive Identification

the arbitration costs, but are usually dependent on the legal background of the arbitration. In some legal systems each party pays its own lawyer, and the loser is required to pay the winner's fees only in rare cases involving frivolous claims or dilatory defence tactics. In other legal quarters, legal fees may be properly included in the costs of arbitration. As yet, there are no arbitration rules compelling the loser to pay the winner's legal fees.

2. Apportionment of Costs

Where the issue of costs is expressly governed by arbitration agreement, the arbitrator must confine himself to the express mandate, determine only those questions which are delegated to his jurisdiction, and approach the question in the way defined in the arbitration agreement.²²³ Subject to the express terms of an arbitration agreement an arbitrator is obliged to dispose of the question of costs. Failures to discharge the primary duty, or to discharge it in a manner inconsistent with the directions of the parties, are both species of misconduct, and render the award at risk of being set aside²²⁴ or, more likely, of being remitted to the arbitrator for fresh consideration according to the *lex loci arbitri*.²²⁵

Most international arbitration rules permit the tribunal to apportion the costs of arbitration with respect to the circumstances of the case. In accordance with Art.40(1) of the UNCITRAL Rules, the unsuccessful party shall bear the costs, unless the tribunal

of Issues and Separate Pricing of Arbitration Services,' (1994) 10 Arb.Int. 119

223. What is known as "American Rule" which requires that each party pay his attorney's fees gives away to the parties' agreement that the prevailing party can be authorised to recur its attorney's fees incurred in any action "to enforce this Agreement in a judicial or arbitration proceeding." *Gingiss International, Inc. v. Bormet*, 58 F.3d 328 (7th Cir. 1995)

224. In *Davis v. Prudential Securities, Inc.*, 59 F.3d. 1186 (11th Cir. 1995), the court set aside an award which contained attorneys' fees.

225. *Damon Compania Naviera v. E.A.L. Europe Africka Line G.m.b.H.(The "Nicki R")*, [1984]2 Lloyd's Rep. 186; *Everglade Maritime Inc. v. Schiffahrtsgesellschaft Detlef von Appen m.b.H.*[1993]3 WLR 176.

apportions the costs between the parties because it considers such apportionment reasonable, taking the circumstances of the case into account. With respect to legal costs, Art.40(2) of the UNCITRAL Rules allows, in general, the tribunal to determine which party shall bear the costs or how they shall be apportioned.²²⁶

Unlike the UNCITRAL Rules, the ICC Rules do not distinguish between the costs of arbitration in general and legal costs of a party. Art.20(1) of the ICC Rules leaves the arbitrators complete freedom to decide which of the parties shall bear the costs or in what proportions.²²⁷ Similar to the UNCITRAL Rules, the LCIA Rules differentiate legal fees from costs of arbitration in general. Art.18(2) of the LCIA Rules provides that “unless the parties shall agree otherwise, the Tribunal shall determine the proportions in which the parties shall pay all or part of them to the Court.” Art.18(3) of the LCIA Rules provides that “the Tribunal shall have the authority to order in its award that all or a part of the legal or other costs of a party (apart from the costs of the arbitration) be paid by another party.” The reason for addressing the issue of legal costs in a special paragraph is that these costs are not expressed in the Schedule of fees. While the LCIA Rules provide in Art.18(1) that the costs accord with the Schedule, without allowing the tribunal any discretionary power, Art.20(3) of the ICC rules provides that the Court may fix the arbitrators’ fees in an amount different from that which would result from application of the annexed scale, if such a fee appears to be necessary in the exceptional circumstances of the case. Because the ICC Rules concern institutional arbitration it is the International Court of Arbitration, rather than the

226. Under the modified version of the UNCITRAL Rules, the Iran-US Claims Tribunal accepted a small portion of attorney’s fees of the successful party even when the fees were reasonable. It is commented that the practice of the Tribunal may have been influenced by the American practice where the successful litigants are not awarded attorneys’ fees in most cases and the belief that the Iranian parties may have been represented by government attorneys. Under these circumstances, the costs of the arbitration before Iran-U.S. Claims Tribunals are substantially lower than those of *ad hoc* arbitration. See Baker & Davis, *op.cit.*, p.217, *Sylvania Technical Systems, Inc. v. Iran*, Case No. 64, Award No. 180- 64-1, 8 Iran-US CTR 298.

227. ICC Final Award in case no. 5622 of 1988, YCA (1994) 105.

arbitrators themselves, who fixes the arbitrators' fees. Art.18(2) of the LCIA Rules provides that the award shall specify the costs of arbitration, subject to approval of the Court that the amount conforms with the Schedule of Costs.

3. Advance Payment of Costs

It is customary to require a deposit for costs at the outset of an *ad hoc* arbitration or an institutional arbitration, to be shared by the parties. Arbitrators are further authorised to require that an additional deposit be placed during the proceedings in the light of developments during the proceedings. Art.9(2) of the ICC Rules requires that each party shall deposit an equal amount as an advance for the costs. Arts.14-16 of the Internal Rules of the International Court of Arbitration deal with the matter involving the deposit of the costs. The amount of the deposit is decided in accordance with the Schedule of Conciliation and Arbitration Costs. Art.15(1) of the LCIA Rules provides, in a less precise rule, that the Tribunal may request a deposit from the parties on account of the costs of the arbitration in such proportions as it deems just.

It is typical in an institutional arbitration that the court, rather than the arbitrators, fixes the deposit²²⁸ and can make the transmission of the file to the arbitrators conditional upon payment.²²⁹ Although Art.15(1) of the LCIA Rules allows the tribunal to direct the parties to pay a deposit, this ability is subject to the approval of the court. It may be questioned how failure to pay a deposit would affect the status of the arbitration since arbitrators have no power to force the parties to pay the required deposit.

The Rules such as ICC Rules in accordance with which deposits are demanded from both parties are most likely to break down when the defendants argue that they are not in want of an arbitration. After one of the parties failed to pay a deposit as required,

228. Art.9(1) of the ICC Rules

229. Art.9(3) of the ICC Rules

the other parties are offered the opportunity to pay the unpaid portion of the deposit. The party who has already fulfilled his own obligations may have a strong interest in getting the arbitration going, and may, thus, be willing to make the payment required of the other party. Art.41(4) of the UNCITRAL Rules provides that the arbitrators are authorised to suspend or terminate the arbitral proceedings in such circumstances. Where parties do not pay the required deposit, Art.9(4) of the ICC Rules provides that the court shall verify whether the advances have been paid and furthermore, that the Terms of Reference shall only become operative and the tribunal shall only proceed with respect to those claims for which the advance has been paid. Similarly, Art.15(5) of LCIA Rules provides that the tribunal may disregard claims or counterclaims by the non-complying party, but it may proceed to determine claims or counterclaims by complying parties. Both the ICC and the LCIA Rules, therefore, differ essentially from the UNCITRAL Rules, because the latter does not provide for partial continuance of the proceedings. Art.41(4) of the UNCITRAL Rules, on the contrary, refers to suspension or termination of the proceedings.

4. Necessity of Security for Costs

While a plaintiff in an ordinary civil action has a choice whether or not to litigate, a defendant is in a less advantageous position, for in order to avoid default judgment, the defendant is compelled to litigate or settle, whether the plaintiff has available assets sufficient to pay the costs of a successful defence or otherwise.²³⁰ Even if the costs of the successful defendant may be assessed through the help of the *curial* court, it is unlikely that he will be fully indemnified for the moneys which he has been compelled to spend on his defence.

Similarly, the respondent of an arbitration may be in an awkward position since

230. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction.

the defence of an arbitration can be an expensive business, even if the claim ultimately fails. The successful respondent will normally be awarded his costs, but this may not be a satisfactory recompense.

Therefore, to depend merely on the “good faith” of an opposing party to comply voluntarily with an award may entail a considerable financial risk. Although parties theoretically can make provision in their arbitration agreement for pre-award security, as a practical matter they are frequently able to agree only on a choice of arbitral regime, and perhaps a *situs* of arbitration and choice of law. By the time an arbitral award is sought to be executed, the party obliged to pay costs may be insolvent or in liquidation, or the assets of the party may be outside jurisdiction and therefore difficult to attach.²³¹ Although it is trite to observe that legal costs are of importance to all parties to arbitration proceedings, securing those costs from an opponent can prove a daunting task.²³² An effective mode of protection is to obtain an order for security for costs at an interlocutory stage in the proceedings before an arbitrator or the courts of the place of arbitration.

The procedure for seeking security for costs is one of a species of procedures founded upon the court’s inherent jurisdiction to curtail abuse of process by ensuring payment of costs. On the face of it, this is a rule for safeguarding defendants against unmeritorious and frivolous claims by plaintiffs who by reason of their not being in the jurisdiction cannot easily be made to satisfy costs orders made against them.²³³ The security will customarily take the form of a payment into the court or a third party undertaking to pay any costs which may be ordered to be paid by the claimant. But the jurisdiction exists even where the plaintiff’s claims are meritorious, and hence it is an

231. Mustill & Boyd, *op.cit.*, p.335.

232. Colbran, ‘Security for Costs of Arbitration Proceedings in England, New Zealand and Australia,’ (1993) *Arb.Int.*85.

233. *Porzelack KG v Prozelack (UK) Ltd* [1987]1 All ER 1074, pp. 1076-77; Colbran, ‘Security for Costs from Nominal Plaintiffs,’ (1992) *CJQ* 384.

important tactical weapon in the defendant's solicitor's armoury in trying to "choke off" a plaintiff's claim.²³⁴

With respect to security for costs, recent English cases are very much supportive of close relationships between international arbitration and the courts. What is intriguing is whether the English courts exercise the discretionary power on security for costs in terms of international arbitration between foreign parties.

Security for costs in relation to international arbitration is a subject on which two broad views may be taken. To some the ordering of security may appear to be an unwarranted intrusion of the court into a consensual arbitral procedure. To others it may seem just that those obliged to resist claims made in arbitrations in England should not be at risk in costs if they do so successfully. The former view may perhaps appeal more to claimants, the latter to respondents.

5. Security for Costs under English Law

a. Bases of Power of the Courts

As regards the power of arbitrators, a distinction must be drawn between those powers which the arbitrator and the court can exercise, as it were, concurrently and those powers which belong exclusively to the court.

The starting point, in consideration of an application before the courts for an order for security for costs, is section 12(6) of the Arbitration Act 1950 as amended by the Courts and Legal Services Act 1990, sections 103 and 125(7) and Schedule 20.²³⁵

234. *Berkely Administration Inc. v. McClelland* [1990]2 QB 407, [1990]1 All ER 958; *Keary Development Ltd v Tarmac Construction Ltd* [1995]3 All ER 534.

235. Similarly, section 14(6) of the Hong Kong Arbitration Ordinance, C.341, Section 13(6) of the Malaysian Arbitration Act, 1952, as amended, and Section 27(1) and Paragraph 1 of the 2nd Schedule of the Singapore Arbitration Act, 1970. Note that, on 31 Oct.1994, Singapore passed the International Arbitration Act 1994 which adopts the UNCITRAL Model Law with some changes that the 1994 Act allows an arbitral tribunal to order security for costs without prejudice to the power of the High Court or a Judge. See, *The International Arbitration Act 1994 of Singapore*, 7 WTAM No.2 141. See also, *Singapore Review of Arbitration Laws*,

Section 12(6)(a) of the Arbitration Act 1950 empowers the High Court to order security for costs in respect of an arbitration on the same principles as those applicable to ordinary English litigation.²³⁶ The power of the High Court to which section 12(6)(a) is assimilated is contained in R.S.C., Ord. 23, r.1(1)(a).²³⁷ Section 726 (1) of the Companies Act 1985 has also provisions on security for costs.²³⁸

The fact that the High Court has power to make an order of a particular kind does not mean that the arbitrator may not also have power to make such an order.²³⁹ The question whether or not there should be security for costs is one which only affects the parties *inter se*, not the administration of justice in general. Although an arbitrator has no inherent power to order parties to give security for costs,²⁴⁰ it is always open to the parties to an arbitration agreement to agree to confer power on an arbitrator to order security for costs, to order a stay of proceedings meanwhile and to dismiss the claim if such security is not provided. The existence of express agreement to give power to

para.45, MAL Quarterly, p.171.

236. Hudson Strumpffabrik G.m.b.H. v. Bentley Engineering Co.Ltd. [1962]2 QB 587

237. The material provision reads as follows:

“Where, on the application of a defendant to an action or other proceedings in the High Court, it appears to the court - (a) that the plaintiff is ordinarily resident out of the jurisdiction + then if, having regard to all the circumstances of the case the court thinks it just to do so, it may order the plaintiff to give such security for the defendant’s costs of the action or other proceedings as it thinks just.”

238. “(1) Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant’s costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

239. Vasso(Owners) v. Vasso(Cargo Owners) [1983]1 WLR 838, p.844; The *Ken-Ren* case, [1995]1 AC 38

240. In *Re Unione Stearine Lanza ad Weiner*, [1917]2 KB 558; The “*Angelic Grace*”, [1980]1 Lloyd’s Rep. 288. Under the new Arbitration Act of 1996, however, the tribunal may order a claimant to provide security for the costs of the arbitration in accordance with section 38(3) of the Bill of Arbitration without the agreement of the parties to the effect. Nevertheless, this power shall not be exercised when the claimant is a foreign national or corporation or association.

arbitrators presiding over arbitration in England to an order of such effect would be crucial.²⁴¹ This power should be capable of being excluded by agreement between the parties and in such a case the corresponding power of the court should also be capable of being excluded.²⁴²

The majority of arbitration agreements with the choice of London as a place of arbitration, particularly where they are of an international character, do not make clear what are the parties' intentions with regard to exercise of the power of the English High Court, contained in section 12(6)(a) of the 1950 Act to make an order for security for costs. In those circumstances, the court has no alternative but to exercise the power in a manner which it deems most close with what would have been likely to have been agreed by the parties if they had been required to deal with the question. The crucial question is whether the power is necessary to enable the arbitrator to discharge his function.

b. Effects of Orders for Security for Costs

An order for security for costs usually provides that proceedings shall be stayed until a provision of security is given. It is accepted that if the order for security granted in relation to an arbitration is not complied with, this means that the arbitration would come to a halt. This in practice is likely to be the result where any party who initiates arbitration proceedings fails to comply with orders made under any of the provisions related with security for costs.

The stay of proceedings is an integral part of an order for security for costs and consequently whether or not there should be a stay is a question relating to or connected with the relief claimed by the defendants.

When an action is stayed pending the provision of security for costs and that

241. *Fal Bunkering v. Grecale* [1990]1 Lloyd's Rep. 369; Harris, *et.al.*, 'London Maritime Arbitration,' (1993) Arb.Int. 275, p.284.

242. *Mavani v. Ralli Bros*, [1973]1 WLR 468, p.474; *Hitachi Shipbuilding & Engineering Co. Ltd. v. Viafiel Compania Naviera S.A.*, [1981]2 Lloyd's Rep. 498, p.505.

security is not provided, the usual next step is to apply for the action to be dismissed and not to order a permanent stay. To grant a permanent stay would mean that the judge has sought to deprive the court of its jurisdiction to entertain any further application in respect of the matter. There may well be innumerable actions which are effectively dead, but technically still in being, because they have only been stayed indefinitely without having been formally struck out or dismissed.²⁴³

On the one hand, an order for security for costs neither awards in advance something which it is the arbitrators' function to award nor calls for any preliminary assessment of the merits. On the other, such an order affects more fundamentally the integrity of the arbitration agreement than any remedy available from national courts; for the order is almost invariably accompanied by a condition that until security is provided the arbitration will be stayed.

With regard to the potential effect of the order for security, the court in the *Korea Shipbuilding* case thought the stay of arbitral proceedings unlikely to happen since those with a financial interest in the builders' success in the arbitration were willing to procure an appropriate guarantee.²⁴⁴ As a result, in the case, the order for security for costs was justified in that neither party, if successful, should be at risk in costs.²⁴⁵ In this respect it is as supportive of the award, so far as it relates to costs, as a *Mareva* injunction will be in respect of the quantum of the award.

c. Exercise of Discretionary Powers

(1) Generally

It may be true in some cases that arbitrators are in a better position to form a

243. *Dorval Tankers Proprietary Ltd. v. Two Arrows Maritime and Port Services Ltd. and Pakistan Edible Oils Corporation Ltd. (The "Argenpuma")*, [1984]2 Lloyd's Rep. 563, p.568.

244. *K/S A/S Bani and K/S A/S Havbulki v Korea Shipbuilding and Engineering Corporation*, [1987]2 Lloyd's Rep. 445

245. *Ibid.*, p.456.

judgment on the issue of security for costs than a court which has no direct knowledge of the case.²⁴⁶ It is significant that Art.15.2 of the LCIA Rules specifically gives this power to the arbitrator. Similarly, the LMAA Terms provide at (A)(4) of the First Schedule to the Terms²⁴⁷, that in arbitrations to which the parties have agreed that the LMAA Terms shall apply, the tribunal has jurisdiction to make orders in respect of security for costs. By such provisions, tribunals supported by those institutions have the power to order security for costs, and have power to direct a stay of the arbitration or impose some other appropriate sanction.

Although Art.8(5) of the ICC Rules does not specifically grant the arbitrator the power to order provisional measures, the practice has developed and today ICC arbitrators often issue orders for conservatory measures, and these are usually complied with voluntarily by the parties.²⁴⁸ This practice left the question whether the parties' choice of a certain arbitration rules should be taken to have impliedly excluded, in relation to any one or more of the statutory grounds set out in the *lex loci arbitri*, for instance, the possibility of a judicial order for security for costs. This was the point which provoked the divergence of approach.

The trend in arbitration law - at least in international cases - is towards non-intervention; the court should, as a general rule, aim to be at the same time supportive but sparing in the use of its powers. Since the primary principle of arbitration

246. Notes, 'Security for Costs in International Arbitration,' (1994) 110 LQR 501, p.505.

247. The relevant part of the First Schedule to London Maritime Arbitrators' Association (LMAA) Terms provides as follows:

“(A) Jurisdiction

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(4) To make interim orders, upon the application of a respondent party to a claim or counterclaim, for the provision of security for that party's costs of the reference, with power to direct, pending provision of such security, a stay of the arbitration or such other direction as may in the circumstances be appropriate.”

248. The arbitral decisions of both no. 6697 of 1990 [1992] Revue de l'Arbitrage 135 and no. 6632 of 1993 (unreported) are cited in Notes, *op.cit.*, p.504.

law is party autonomy, the court should consider first the fact that that arbitration is a consensual process and should recognise and give effect to any agreement between the parties, express or tacit, as to the way in which the arbitration should be conducted.²⁴⁹

The decision of the *Ken-Ren* case²⁵⁰ was received with some surprise in certain commercial quarters, because the House of Lords of the United Kingdom decided to make an order in respect of an ICC arbitration in which both parties were foreign.²⁵¹ The *Ken-Ren* case raised not only a specific question as to whether the Court should make orders for security under the Arbitration Act 1950, s.12(6)(a) but also the more general issue concerning the spirit in which the court should approach the exercise of its statutory or other powers to order interim relief in the context of international arbitration between foreign parties conducted in accordance with the procedural rules of an arbitral institution.

In the case, dispute having arisen between the parties, Ken-Ren initiated an ICC Arbitration against Coppée Lavalin. Shortly after the establishment of the terms of reference under the ICC Rules, Coppée applied to the English High Court seeking an order for security for costs, giving as grounds the fact that Ken-Ren, ordinarily resident out of the jurisdiction, was insolvent and that the arbitration was financed by the Government of Kenya; thus Ken-Ren would be unable to pay Coppée's costs if ordered to do so.

The application by Ken-Ren was dismissed both in the Commercial Court and in the Court of Appeal, mainly on the basis of the authority of the *Bank Mellat* case.²⁵²

249. When the decision in *Bank Mellat v Helleniki Techniki SA* [1984] QB 291 was made, it was considered as a reassuring sign that London would be chosen between non-English parties in a large number of the cases where the parties chose London, or where the ICC would choose London as a place of arbitration. See, Jarvin, 'Choosing the Place of Arbitration : Where do We Stand?' (1988) 16 IBL 417, p.419.

250. The *Ken-Ren* case, [1995]1 AC 38 (HL(E))

251. Notes, 'The *Ken-Ren* Case: Much Ado About Nothing Very Much,' (1994)10 Arb.Int. no.3, 303, Notes, 'The *Ken-Ren* Case: It is an Ado when more Aid is Less Help,' (1994)10 Arb.Int. no.3, 313

The House of Lords delved thoroughly into the comparison of the *Bank Mellat* case with the *Korea Shipbuilding* case.²⁵³

(2) Institutional or Traditional Arbitration

The *Bank Mellat* and the *Korea Shipbuilding* cases have some common features in terms of nationalities of the parties, place of making contracts, place of performing contracts, and place of arbitration in London with the result of importing English *curial* law. The *Bank Mellat* case was one where the contract provided that the arbitration should take place in the City of London, albeit that the substantive law was foreign, that the original contracting parties and the subject matter of the contract had no connection with England and that the arbitration was to be conducted under the ICC Rules.

The decision of the *Bank Mellat* case reveals that the English courts are not willing to order security for costs where the contract was a construction or civil engineering contract, under which the parties undertook to carry out work in a foreign country, and the arbitration clause provided for arbitration in a neutral forum and England was chosen either for practical convenience or because nominated by an independent body.

Although security was not granted in the *Bank Mellat* case, however, Robert Goff L.J., having come to that conclusion, goes on to make the difference between his approach and that of Kerr L.J. by stating that if in such an arbitration there was reason to believe that the claimants would be unable to pay the costs of the respondent if unsuccessful in his defence, then “it would be proper for the court + to exercise its discretion to order the claimant to furnish security for the respondent’s costs.”²⁵⁴ The *Korea Shipbuilding* case was differentiated from the *Bank Mellat* case in that the proper

252. *Bank Mellat v Helleniki Techniki SA* [1984] QB 291.

253. The *Korea Shipbuilding* case, [1987] 2 Lloyd’s Rep. 445

254. The *Bank Mellat* case, [1984] QB 291, p.316.

law of the contract was English; and that the parties did not incorporate a detailed code of procedural rules other than ordinary English rules of procedure; and that the arbitration was “to be regarded as regular London business as the *Bank Mellat* arbitration could not.”²⁵⁵

In the *Bank Mellat* case, an agreement to arbitrate in England under some English arbitral rules, such as those of an English trade association, or under the terms of an English standard form of contract, with the consequence that the substantive law would also be English, was considered to carry weight in favour of the exercise of the discretion of English courts, even if both parties were foreign and the contract had no other connection with England.²⁵⁶ In the *Korea Shipbuilding* case, the Court of Appeal quashed the decision by Hirst J. of first instance on grounds that he did not apply the principles to be extracted from the *Bank Mellat* decision. Hirst J. reasoned that the shipbuilding contract in the case fell into the category where the English court did not exercise the discretionary power in terms of security for costs.

The Court of Appeal in the *Korea Shipbuilding* case held that the shipbuilding contract was a type of maritime contract out of which arbitration was regularly held in London.²⁵⁷ The Court of Appeal emphasised that the parties agreed on the English proper law of the contract, drafted the contract with reference to English or Common law concepts, incorporated ordinary English rules of procedure, provided for default appointment of a third arbitrator by the President of the London Maritime Arbitrators’ Association, and were aware of the English court’s ancillary and supervisory role in English arbitration.²⁵⁸ As a result, the category set in the *Bank Mellat* case in which security for costs was able to be granted came to include English shipbuilding contracts.

255. The *Korea Shipbuilding* case, [1987]2 Lloyd’s Rep. 445, p.452.

256. The *Bank Mellat* case, [1984] QB 291, p.303 per Kerr L.J., p.314 per Robert Goff L.J.

257. The *Korea Shipbuilding* case, [1987]2 Lloyd’s Rep. 445, p.453.

258. *Ibid.*, p.452.

In the *Gulf Petroleum* case²⁵⁹, the arbitration arose out of a contract between the parties which provided for the supply by *Gulf Petroleum* to Renel of crude oil shipments to be paid for by the counter-supply by Renel to *Gulf Petroleum* of refined petroleum products to the value of 70 per cent of the crude oil shipments and otherwise by payments in Romanian lei and U.S. dollars. In essence, the decision of the *Gulf Petroleum* case is similar to that of the *Korea Shipbuilding* case to the effect that the arbitration agreement of the *Korea Shipbuilding* case was referred to as providing for a type of maritime arbitration which had for many years regularly been conducted in London.

Although the contract in the *Gulf Petroleum* case was not like those standard charter party or commodity contracts which contained within themselves standard arbitration clauses providing for arbitration in London, it was held that the contract was one concerning the supply of crude oil, a commodity concerning which arbitration in London frequently takes place, and the arbitration agreement in the case included many English factors in nature. As a result, following the reasoning of the *Korea Shipbuilding* case, the court of the *Gulf Petroleum* case treated the arbitration as traditional, regular and domestic arbitration in London.

(3) Institutional Rules and *lex loci arbitri*

In the *Ken-Ren* case, in a very detailed speech, both on the various issues of English law and on the ICC arbitration system, Lord Mustill took the view that, contrary to the decision in the *Bank Mellat* case, English courts, which have the power to do so, may order security for costs in international arbitrations having no other contact with England than the venue; such power is not contrary to the ICC procedure, chosen by the parties; it is, however, a matter of discretion whether security should be ordered or not. Lord Mustill connects the power of the courts to order security with the

259. *Renel v. Gulf Petroleum* [1996]1 Lloyd's Rep. 67

wording of Art.8(5) of the ICC Rules as to which the other Law Lords in the case did not raise any question. In their Lordships' view, an order for security is a conservatory measure that a party may require from a state court without infringing its obligation to arbitrate since the substantive dispute is awaiting final adjudication and the arbitral process is not frustrated in its last stages by the refusal of the losing party to honour the award.²⁶⁰

This reasoning is doubted on the grounds that conservatory measures concern the subject-matter of the dispute, not its ancillary arrangements such as advances towards the arbitrator's fees and the like; and that this power is not mentioned in so many words in the ICC Rules.²⁶¹ It is submitted further that security for costs under the ICC Rules is objectionable on the ground that an order for security by the national court would be inconsistent not with their individual terms but with the scheme which they embody, since they comprise a complete and self-contained procedural code which leaves no room for recourse to the local court.²⁶²

Theoretically, as far as orders for security for costs are concerned, arbitrators may be authorised by the parties to an *ad hoc* arbitration as well as an institutional arbitration. However, beyond the parties, the arbitrators cannot exercise coercive powers. Even towards the parties, it is unlikely that the arbitrators are authorised to strike a claim out automatically when an order for security for costs is not observed.²⁶³

260. The *Ken-Ren* case, [1994]2 WLR 631, p.642.

261. Notes, *op.cit.*, p.504. Similar questions as to the meaning of provisional, interim or conservatory measures can be raised in relation to the construction of Art.24 of the Brussels and Lugano Conventions. According to a view that interim or conservatory measures are understood as to safeguard rights in an application for the recognition of which has been made to the court with jurisdiction as to the substance of the matter, a security for costs order would not constitute a provisional measure under Art.24, even though it would plainly be classified as an interlocutory in the common law systems. See, Mathews, 'Provisional and Protective Measures in England and Ireland at Common Law and Under the Conventions : A Comparative Survey,' (1995)14 CJQ 190, p.198.

262. The *Bank Mellat* case, [1984] QB 291, p.309.

263. Probably the most an arbitrator could do would be to fix a very early hearing and perhaps

Nowadays, the number of international arbitration institutions is increasing throughout the world,²⁶⁴ but the rule-makers for such institutions have not set out to produce a complete voluntary code of arbitration. The reason is, on the one hand, that a complete code of arbitration is impossible or impracticable to achieve, and on the other hand, that the coercive powers of a national court are considered necessary to make arbitration effective.²⁶⁵

Outside the incomplete power of the arbitrators which may be allowed under international arbitration rules, it will often be the case that only national courts are in a position to grant interim relief including order for security for costs. It is an express recognition that such measures may well be necessary to ensure that the award is effective and the purposes of the arbitration are not stultified before the actual hearing is undertaken.

Where Art.8(5) of the ICC Rules is applicable to domestic arbitration, the article cannot induce an intention to exclude all other interlocutory forms of judicial intervention or assistance provided by the law of the forum. Thus, the fact that the security sought by a party may include security for that party's share of the deposit required under Art.9 of the ICC Rules does not affect the position, and it does not result in any duplication or double payment by the party against whom the order is made.²⁶⁶

(4) Exceptional Application of *lex loci arbitri*

The difference of opinion between the majority and the minority in the *Ken-Ren*

disentitle the claimant from relying on his pleaded case(if any). See, Harris, *et.al.*, *op.cit.*, p.295.

264. Vigrass, 'The Role of Institution in Arbitration,' in *Handbook of Arbitration Practice*(1993) edited by Bernstein and Wood, p.461.

265. Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (2nd ed., 1991), p.69

266. *Badger Chiyoda v CBI NZ Ltd.*, [1986]2 NZLR 599, p.607.

case is in part a reflection of the fact that the precise way in which the balance of competing interests between the parties should be struck is not uncontroversial.²⁶⁷ It is true that an order for security for costs is sanctioned by the threat of a stay of the arbitration and that, if executed, this power is a drastic incursion upon a private form of dispute-settlement. Nevertheless, such a degree of interference was held justified on the special facts of the *Ken-Ren* case. It is submitted that the majority in the *Ken-Ren* case were right to avoid the possibility that the claimant, an insolvent company, might lose the arbitration and that its majority shareholder, a sovereign state, might fail to pay the victorious parties' costs.²⁶⁸

The *Ken-Ren* case shows that security for costs may be ordered in circumstances where a nominal foreign plaintiff, not suing in a representative capacity, is suing for the benefit of some other person and there is reason to believe that the nominal plaintiff will be unable to pay the costs of the defendant if ordered to do so.²⁶⁹

The fact that the arbitration is being funded by a third party, namely, the state of Kenya in the *Ken-Ren* case, is considered as an exceptional factor besides the insolvency of the claimant.²⁷⁰ If the proceedings are unsuccessful the respondent will almost certainly have insufficient means to pay costs and the state, which has the means, will have no responsibility for paying costs. It is, however, not easy to see how a power of the English court either to stay the action pending the provision of security or to dismiss it if the order is not complied with can be similarly derived when the court makes an order under section 12(6) of the 1950 Act, since it is well settled that unless

267. Hill, 'Security for Costs in ICC Arbitration,' [1995] LMCLQ 19, p.22.

268. Andrews, 'Arbitration under ICC Rules and Security for Costs,' [1994] CLJ 470, p.471.

269. Colbran, *op.cit.*, p.386.

270. It is pointed out that the "exceptional" circumstances test in *The Ken-Ren* give little judicial guidance so as to justify court intervention in the arbitration proceeding. See, Lynch, 'Security for Costs in Domestic and International Arbitration in England and Hong Kong,' (1995)12 J.Int.Arb.17, p.47.

circumstances are quite exceptional, the High Court has no inherent jurisdiction to intervene in a pending arbitration.²⁷¹ What is evident is that the majority decision of the *Ken-Ren* case has highlighted the uncertainty of the exercise of discretionary power of the English court since the decision was largely based on “exceptional” test.²⁷²

Any overseas parties who choose to have that kind of arbitration conducted in England, should be taken to appreciate that they will be subject to the current practice with regard to security for costs applied by the Commercial Court. If they do not wish to be subject to that policy then they should indicate this in their arbitration agreement.²⁷³ Therefore, the plaintiff in an ICC arbitration may not run the risk of going to London, providing security for costs, by the effect of a court decision, possibly in addition to the share of the advance towards the costs of the arbitration incumbent upon the defendant.²⁷⁴ It remains to be seen how far the decision of the *Ken-Ren* case will affect the popularity of the City of London as a venue for international commercial arbitration especially with a new Arbitration Act.

271. The *Bremer Vulkan* case, [1981] AC 909; The “Choko Star”, [1987]1 Lloyd’s Rep. 508, p.515; K/S A/S Bill Biakh and K/S A/S Bill Biali v. Hyundai Corporation [1988]1 Lloyd’s Rep. 187.

272. Sarre, ‘Security for Costs in ICC Arbitrations in England - The Ken-Ren Case,’ in ICC Court, *International Commercial Arbitration in Europe - Special Supplement*(1994) The ICC Bulletin 58, at 62.

273. The *Ken-Ren* case, [1994]2 WLR 631, pp.658- 659.

274. Notes, ‘Security for Costs in International Arbitration,’ (1994) 110 LQR 501, p.505.

CHAPTER FIVE: THE KOREAN PERSPECTIVES

I. Background

As with many other areas of Korean law, arbitration law has a comparatively short history of development. Arbitration had been regulated by provisions of Japanese Civil Procedural Law until Korea was emancipated from the occupation of the Japanese Empire in 1945 when the Japanese Emperor surrendered unconditionally to the United States. Although the Japanese retreated from the Korean peninsula, however, their rules and laws were considered still in force by the Korean leaders in various sectors who had been educated in Japan. Japanese laws were simply borrowed so as to fill the gap of statutory regulations.

During the first 3 years after the emancipation, there was huge turmoil where ideological struggles between communists and democrats were getting harsher. In 1948, two different governments, The Republic of Korea (ROK) and The Democratic People's Republic of Korea (DPRK), were created from scratch in the southern and northern part of the Korean peninsula respectively. While the two governments were pursuing different political and economic systems, the 38th Parallel, a temporary imaginary line which had been drawn across the Korean peninsula at 38 degrees latitude, turned into a solid line showing the division of the Korean peninsula into two by early 1950.

In the southern part of the Korean peninsula, the elected law-makers did not concentrate on Parliamentary works well enough to reform the borrowed Japanese laws for their newly created democratic country. Worse, they were hardly able to continue work on legislation during the Korean War of 1950 - 1953 between South and North Korea with the support of the United Nations Forces and Sino-Soviet military powers respectively. Even after the War ended in 1953, law reforms were not given first

priority. What mattered for the Southern Koreans was how to survive while the threat from the North was still lingering on above the Demilitarised Zone (DMZ) which replaced the 38th Parallel after the Korean War ended in 1953.

In 1960, a coup led by young military elites was successful in overthrowing the inefficient civil government which had survived the War. After the coup, revolutionary movements swept all over the ROK. Law reform was no exception. Many areas of the borrowed Japanese law were replaced by new laws enacted by the newly organized Parliament. When the Japanese Civil Procedural Law was replaced, the provisions on arbitration in it were abolished. After the success of the coup, the military government under the controversial leadership of General Park started to plan a magnificent economy boosting operation which proved an unprecedented success for the next 3 decades. The plan was export oriented so as to modernise the whole industry of ROK. At that time, the Southern Koreans were generally dependent on agriculture in contrast with the people in the Northern part of the Korean peninsula where heavy industry complexes had been built by the Japanese Government to prepare for war in mainland China.

II. Arbitration Law and Institution in Korea

It occurred to the Korean Government that arbitration might be able to work as a way of resolving disputes involving Koreans in their export to foreign countries. The provisions on arbitration which had been deleted from the borrowed Japanese Civil Procedural Law were reinstated. As a result, the Korean Arbitration Act(KAA) was enacted in 1966 as an individual act which is not common in Civil law jurisdictions, while the Commission on International Commercial Arbitration ("he Commission") was created under the Korean Chamber of Commerce in the same year. The Commission had its own rules of commercial arbitration which were prescribed to be confirmed by the Supreme Court. In 1970, the Commission was renamed as the Korean Society of

Commercial Arbitrators whose regulating body was the Ministry of Commerce and Industry ("the Ministry").

The KAA was amended in 1973 with regard to appointment of arbitrators, procedural rules, and grounds of setting aside arbitral awards. In accordance with the provisions of Art.4(3) of the KAA, the rules of an organisation designated by the Ministry are deemed to have been agreed to apply for appointing an arbitrator with respect to an arbitration out of commercial relationship ("commercial arbitration") when the parties to the arbitration have not agreed how an arbitrator was to be appointed, nor were their intentions expressed otherwise. According to Art.7(3) of the KAA, the rules of the organisation are also deemed to be agreed to apply to the proceedings of "commercial arbitration" when the parties did not agree how the arbitration was to proceed, or express their intentions otherwise. In accordance with Art.18 of the KAA, the rules of the organisation shall be confirmed by the Supreme Court whenever there is any creation or amendment of the rules. In the addenda to the KAA, the organisation mentioned in Arts.4(3), 7(3), and 18 was deemed to be the Korean Society of Commercial Arbitrators. In 1980, the Korean Society of Commercial Arbitrators was changed into the Korean Commercial Arbitration Board (KCAB). The amendment of KAA took place at the same time when ROK acceded to the 1958 New York Convention (The Convention).

It can be seen from the brief history of the KAA that the Korean Government was keen on providing a facility of resolving disputes out of export activities by Korean nationals through arbitration. The approach is apparent from the provisions affording legal status to the KCAB on the basis of express provisions of the KAA and putting the rules of the KCAB under the supervision of the Supreme Court. It can be said that although the KAA did not confine its application to international arbitration, the purposes of the KAA are mainly for arbitration involving disputes between Korean nationals and foreigners. For the present, the number of arbitrations under the auspices

of the KCAB is increasing slowly in comparison with the fast growing number of actions before the courts.¹ Since 1991, the KCAB has taken the initiative of reforming the KAA so as to follow those many countries which have adopted or are contemplating the adoption of the UNCITRAL Model Law into their domestic arbitration laws. The KCAB has made efforts to publicise the principles of the Model Law by organising seminars and presenting the key points which can be taken into account in reforming the KAA. The KCAB commissioned four eminent scholars to make a proposal for the reform of the KAA.² They completed the first proposal on which some comments were given by practitioners and scholars. The KCAB has now presented the second proposal (the Proposal) for enticing further comments.

III. Application of Korean Private International Law

A. Generally

The law of the place of arbitration (*lex loci arbitri*) takes the highest ground in the hierarchy of the laws applicable to an arbitration when there arise questions whether there was a valid agreement to arbitrate, or which law was to be applied to the proceedings of arbitration. The question has usually been raised in cases before Korean courts when the enforcement of an award under the Convention was sought before them. The *lex loci arbitri* is taken into account to decide which grounds of refusal in Art.V of the Convention are to be applied. Even before the stage of enforcement, the *lex loci arbitri* which is considered to have been agreed is also regarded as a key factor to decide whether there is an agreement which is valid enough to dismiss an action which is alleged to be brought in breach of the arbitration agreement. It is generally recognised, although there is an Indian exception³, that mandatory rules of *lex loci*

1. Baik, 'The Trends of Arbitration Cases (1990-1994),' (1995) 275 Arb.J. 6.(in Korean)

2. H.Kim, 'Some Comments on the Proposal for the Reform of Arbitration Act,' (1995) 276 Arb.J.9, p.13. (in Korean)

arbitri control the proceedings of an arbitration just as much as mandatory rules of an enforcing country may be considered so as to get an award enforced.⁴

The *lex loci arbitri* is based on the agreement between the disputing parties to set the arbitration in a particular place. The agreement is usually found in an arbitration clause or submission agreement. Under Korean law, Korean Private International Law (KPIL) is designed to search for the rules governing activities either of foreigners in the territory of the Republic of Korea, or of Korean nationals in foreign countries.⁵ In accordance with Art.9 of KPIL, the parties may agree to choose rules to govern the forms and validity of a legal transaction which, failing such agreement, shall be governed by the law of the place in which the transaction is undertaken.

There are few court actions in which the principles of arbitration were involved. There are even fewer cases in which the provisions of KPIL were scrutinised in terms of *lex loci arbitri*. A few recent cases before the Supreme Court which involved *lex loci arbitri* were considered are suggestive of the way KPIL is to be applied in terms of international arbitration.

B. Enforcement of Awards

In the *GKN* case⁶, the Supreme Court made it clear that KPIL should be applied so as to decide whether an international arbitration award involving Korean nationals was to be enforceable in Korea. The enforcement of the award was involved in judgments in five instances. The first judgment of the Seoul District Court of Civil

3. NTPC v. Singer, (1993) YCA 404

4. The *Mitsubishi* case, 473 US 6144.

5. Art.1 of the Korean Private International Law ("KPIL")

6. GKN International Trading (London) Ltd v. Kukje Sangsa Co.Ltd, the Supreme Court, 84 Da Ka 1003, Judgment of 9 February 1988. (in Korean)(The first appealed case); GKN International Trading (London) Ltd v. Kukje Sangsa Co.Ltd, the Supreme Court, 89 Da Ka 20252, Judgment of April 10, 1990.(in Korean)(The second appealed case) The English extracts can be found in YCA XVII(1992) 568.

Affairs of 9 April 1984 denying enforcement was upheld by the High Court of Seoul. The English plaintiff appealed to the decision before the Supreme Court. On 9 February 1988, the Supreme Court remanded the decision by the High Court of Seoul with the effect of denying the application of the enforcement of the award on the ground that the High Court erred in applying Korean law to decide whether there was a valid arbitration agreement between the parties. The Supreme Court held that it was English law which was chosen in accordance with Art.9 of KPIL and applied to decide whether the representation of an agent on behalf of the Korean party was legally made so as to give the principal agreement containing the arbitration clause the effect of binding them.⁷ Although the Supreme Court did not mention the provisions of Art.V(1)(a) of the Convention, the court remanded the case to the High Court of Seoul for the reasons that English law should have been applied since the place of making the contract was London. Following the Supreme Court's direction, the High Court gave a judgment of 26 June 1989 in favour of enforcing the award, reversing the decision by the Seoul District Court of Civil Affairs. The Korean party, in turn, brought the case before the Supreme Court, but they were not successful. The Supreme Court in the second appealed case of the GKN case reaffirmed the attitudes on the application of Art.9 of KPIL in its second judgment with respect to the same subject matter.

When the provisions of Art.V(1)(a) of the Convention are construed together with those of Art.II(1), it is evident that an arbitration agreement must be made by parties with full capacity. As in the *GKN* case in which the validity of an arbitration agreement was questioned at the stage of enforcing the award, the court of the enforcing country shall apply its own rules of private international law to find whether the parties were capable of making an agreement to arbitrate.⁸ In the *GKN* case, the Supreme

7. The first appealed case of the GKN case, *GKN International Trading (London) Ltd v. Kukje Sangsa Co.Ltd*, the Supreme Court, 84 Da Ka 1003, Judgment of 9 February 1988. (in Korean)

8. van den Berg, *The New York Arbitration Convention of 1958* (1981), p.56.

Court was correct in applying the rules of KPIL to decide whether the agent was capable of making an agreement which had binding effect on his principal.

C. Validity of Arbitration Agreement

The GKN case is to be contrasted with the Bumyang case in which the decision was made approximately two months earlier than that of the second *GKN* case. In the *Bumyang* case⁹, it was decided that an arbitration clause contained in Bills of Lading (B/L) was null and void, and incapable of being performed under English law, and that a holder of B/L for the sole purpose of securing the payment of the amount of letter of credit(L/C) was not in the position of the parties to the B/L. The B/L was issued by Bumyang as a carrier after a cargo of corn was shipped under a charter party between Bumyang and Daewoo International which was registered in the United States. Kyung Sung Co.Ltd., the consignee on the B/L, failed to pay the amount of L/C to Nonghyup who had obtained the B/L so as to secure the payment. Bumyang, however, allowed the discharge of the cargo without proper production of B/L which was kept in the hands of Nonghyup. Nonghyup brought a claim for damages against Bumyang. Bumyang sought to dismiss the action on grounds of the existence of an arbitration agreement of Centrocon type in the B/L which provided that any disputes should be referred to three arbitrators sitting in London.

One of the key issues was which law governed the validity of the arbitration agreement. At all levels, it was decided that English law should be applied as the applicable law to the issue. In the English law of the time when the case was before the Supreme Court of Korea, it was established that a holder of B/L for security was not a party to B/L with regard to a carrier since the Bills of Lading Act of 1855 had not been repealed by the Carriage of Goods by Sea Act of 1992 so as to make the terms and

9. Nonghyup v. Bumyang Mercantile Shipping Co., Supreme Court, 88 Da Ka 23735, Judgment of Feb.13, 1990.(in Korean)

conditions of B/L effective as between the holder of B/L for security purposes and the carrier.¹⁰ The Supreme Court held that there took place no error of law in the proceedings before the courts below on the grounds that the application of English law which was chosen on the basis of the place of arbitration expressed in the arbitration clause would make the B/L invalid or ineffective as between Bumyang as a carrier and Nonghyup as a holder of B/L for security.

It is worth mentioning that the Supreme Court did not take KPIL into account. Although there had been no case in which the application of Art.9 of KPIL was tested before the Supreme Court in terms of the validity of an arbitration agreement, it was established that KPIL should be applied in circumstances where Korean nationals were involved in activities in foreign countries.¹¹

It may be argued that both Bumyang and Nonghyup are Korean companies, which prevents the provisions of KPIL being applied. Given that the B/L was actually issued by Bumyang to Dae Woo Int. and that Dae Woo Int. was, in technical terms, not a Korean company, it can be submitted that the Supreme Court in the case did not interpret the relationships between nationalities of disputing companies and the application of KPIL properly. Leaving aside the issue of the application of KPIL, the way that the Supreme Court approached the arbitration clauses which provided for foreign seats of arbitration may also be questioned.

Curiously enough, the Supreme Court in the *Bumyang* case applied English law to reach the result of invalidating an arbitration clause contained in B/L on the assumption that the arbitration clause in B/L was valid. In an indirect way, the

10. *Sewell v. Burdick* (1884) 10 App.Cas. 74.

11. In *Jeil Kisun v. Kun Sul* (The "Sun River"), Seoul District Court of Civil Affairs, 83 Ga Hap 7051, Judgment of April 12, 1984 (in Korean), the Panamanian company chartered its own vessel *Sun River* to the Korean party for the shipment of chemical compounds from Lye Soo in the southern part of Korea to a port in Iran. The court held that KPIL should be applied so as to find a governing law of arbitration since the charter party between the parties contained an arbitration clause which did not provide for a law to govern the arbitration.

Supreme Court decided the issue of invalidity of an arbitration agreement which might be raised before the arbitral tribunal which would be constituted in accordance with the arbitration clause in B/L. Without considering that the B/L was issued in the United States from the relationship between Bumyang as a carrier and Dae Woo Int. as a shipper, the Supreme Court must have recognised the arbitration in the case as an arbitration outside the ambit of the Convention since the disputes whether there was any valid agreement to arbitrate were raised between Korean companies. If the Supreme Court had regarded the arbitration as one falling under the Convention, the Supreme Court would have dismissed the action before it in accordance with Art.II(3) of the Convention.¹² It is reported in American cases that it is the arbitrator who decides even on arbitrability issues.¹³ Although the Supreme Court in the *Bumyang* case participated actively in dealing with the question of the invalidity of the arbitration agreement, it is desirable that the matter should have been left to be raised in arbitral proceedings in London. It is most likely that the arbitrators operating in London would be in a better position to decide in terms of English law the question whether the arbitration clause in the B/L could be relied on by Bumyang against Nonghyup as a holder of B/L for security purposes.

D. Principles of Separability

What is confusing about the reasoning of the Supreme Court in the *Bumyang* case is that the English law which was considered to have been agreed by the parties

12. With regard to such cases involving arbitration as can be under either Art.3 of KAA or Art.II(3) of the Convention which prevents an action being raised in breach of an arbitration agreement, there are no clear provisions on the power of the court either to dismiss or to stay, or both. It is, however, submitted that the court in the above cases shall dismiss the action. See Lee, *The Law of Civil Procedure* (1994) (in Korean), p.26.

13. The *Mitsubishi* case, 473 US 614; Aksen, 'US Court Defers Antitrust Issues to Swiss Arbitral Tribunal,' (1995) 12 J.Int.Arb.3 ; *The Sky Reefer*, 29 F.3d. 727 (1st Cir. 1994); Case and Comment, 'Bill of Lading Forum Selection Clauses in the United States : The Supreme Court Charts a New Course,' [1996] LMCLQ 164.

made the B/L in effect invalid as between Bumyang and Nonghyup so that the arbitration clause as contained in the B/L was found invalid. In England, the principle of separability has now been established after the decision in the *Kansa* case.¹⁴ After the *Bumyang* case, it remains to be seen whether the principle of separability can be introduced in a new Korean Arbitration Act.

What is promising is that the Supreme Court in the *GKN* case has shown some prospect of such an introduction. In the second appeal of the *GKN* case, the second Chamber of the Supreme Court tried to find whether the arbitration clause in itself was valid or not. This attitude is markedly different from that of the first appeal of the case, since in the first appeal of the case, the Supreme Court had consistently regarded the fate of the arbitration clause and that of the main contract as one. The difference is vivid in that the Supreme Court in the first appealed case dealt with the matter as to whether the entire contract was made properly in accordance with English law which was likely to be designated by Art.9 of KPIL. It is evident that the Supreme Court in the first appealed case did not separate the arbitration clause from the other part of the entire contract.

In the *Bumyang* case, the court started its reasoning after separating the arbitration clause from the B/L so as to find which law was to govern. At the very last, however, the court held that the arbitration clause was invalid or incapable of being performed since the B/L was not valid or incapable of being performed under English law as the governing law provided for in the arbitration clause. It can, therefore, be said that the court in the *Bumyang* case took the same attitude, as shown in the first appeal of the *GKN* case.

Since the decision of the *Bumyang* case was made earlier than that of the second appeal of the *GKN* case by two months, it may be submitted that the Supreme Court has

14. *Harbour v. Kansa*, [1992]1 Lloyd's Rep. 81, [1993]3 WLR 42; Notes, 'Separability comes of Age in England: *Harbour v. Kansa* and Clause 3 of the Draft Bill,' (1995) 11 Arb.Int. 85

changed its attitude in terms of the principle of separability. This may be correct in that generally the principles of separability were discussed and placed in the provisions of the Proposal.¹⁵ It is necessary to wait for other decisions by the courts before any conclusion is made in relation to the attitudes of them as to the principle of separability.

IV. Interim Relief by Korean Courts

A. Attachments and Injunctions

Under Korean law, a plaintiff can seek two forms of interim relief. On a preliminary basis, a Korean court of competence can make an order to attach moveable or immovable property for security on account of monetary claims or the like.¹⁶ The court also has the power of granting a preliminary injunction so as to prevent the realisation of a claim being rendered impossible, where it appears to it to be expedient. Without such power, it would be impossible or likely to be difficult to realise a claim.¹⁷ According to Art.715 of KCCP the provisions on preliminary attachments are also applicable to the procedures for interlocutory injunction with minor exceptions.

In order to get preliminary attachments the plaintiff must show that he is in need of imminent measures lest the enforcement of a prospective judgment in his favour should be impossible or severely hampered, and also specifically when the judgment is to be enforced abroad.¹⁸ The terms of the attachment order are at the court's discretion, provided that an order must never finally dispose of, but only secure, a claim. It follows that the creditor cannot obtain satisfaction through the Attachment order but can only block the assets of the defendant. Since the attachment order enables the creditor

15. H. Kim, 'Some Comments on the Proposal for the Reform of Arbitration Act,' (1995) 276 Arb.J.9, p.13. (in Korean)

16. Art.696 (1) of the Korean Code of Civil Procedure("KCCP")

17. Art.714(1) of KCCP

18. Art.697 of KCCP

to seize the debtor's assets before the judgment, the attachment order has direct effect with regard to the assets in question.

For interlocutory injunctions, the plaintiff shall show the necessity of avoiding impediments against the plaintiff's continuing both contractual and statutory rights, or other necessary grounds.¹⁹ The injunctions give some protection to the plaintiff so as to preserve claims other than money claims. Since the plaintiff will have to show some urgent necessity of preliminary attachment or injunctions without which a judgment that might be rendered later on will be ineffective, the plaintiff needs to be in a position of prevailing on the merits. Attachments or injunctions will be revoked when there is sufficient security to make prospective judgments effective.²⁰

Although Korean courts usually decide the application of attachments or injunctions in the form of *ex parte* orders without hearing the opposing party, the courts shall decide the application in the form of final judgment when there is a hearing between the disputing parties.²¹ A party against whom attachments or injunctions were made can ask for reduction or revocation of attachments or injunctions. To decide the application of reduction or revocation, the court must hold an oral hearing.²²

B. Foreign Proceedings in Relation to Foreign Parties

In terms of foreign proceedings, Korean courts can order attachments or injunctions when the applicants show sufficient urgency in support of the necessity of such reliefs. The court can base itself on the provisions of Art. 697 of KCCP that attachments can be granted in cases where the judgment is to be enforced abroad. From this provision, it is evident that Korean courts would grant a preliminary attachment or

19. Art.714(2) of KCCP

20. Arts.706(1) and 720 of KCCP

21. Art.701(1) of KCCP

22. Art.704 of KCCP

injunction without questioning whether the attachment or injunction would be necessary for the prospective judgments so as not to make the judgments ineffective. The court is likely to grant an order of arresting a ship within its jurisdiction when the party has brought an action against the other party whose normal residence is not in Korea.

Art.697 of KCCP may, therefore, be considered the most powerful remedies available from Korean courts for foreign proceedings. According to the first part of Art.697 of KCCP, provisional attachment is to be authorised where it is reasonable to fear, in the light of the circumstances of the case, that enforcement of the subsequent judgment would otherwise be made impossible or substantially more difficult. By virtue of the latter part of Art.697 of KCCP, such difficulties are presumed from the mere fact that enforcement is to take place in a state other than the Republic of Korea.

Given that Korean courts can have jurisdiction to grant preliminary attachments or injunctions in terms of a foreign action whose merits are not a requirement and whose parties need not have any connection with Korea, preliminary attachments or injunctions may be of great facility for a party wishing to have security for the enforcement of a judgment which could be in his favour. Since a seizure order is automatically granted in all cases in which the judgment to be delivered in due course has to be enforced abroad, such an order may also be made against a Korean national who has no assets outside Korea of sufficient value for the judgment given against him to be enforced.

It is, however, difficult to imagine that Art.697 of KCCP can be invoked against a Korean undertaking or national involved in foreign proceedings. The provisions of Art.697 of KCCP were intended for Korean parties whose judgment is to be enforced abroad. These are legislated as a protection for Korean plaintiffs against non-Korean defendants whose assets are situated in Korea. For this reason, Korean courts will follow German practice.

In Germany, German courts have ruled that no attachment will be granted if

property within Germany provides the German defendant with sufficient security for the plaintiff and there is no reason to believe that this property will be hidden from him before enforcement of an ultimate judgment.²³ In terms of the German practice, even though Art.917(2) of the German Code of Civil Procedure (ZPO) which is mostly the same as the latter part of Art.697 of KCCP, does not show overt discrimination based on nationality, it is the decision of the European Court of Justice that the national provision in question leads in fact to the same result as discrimination based on nationality since the great majority of enforcement abroad are against persons who are not of German nationality or against legal persons not established in the Federal Republic of Germany.²⁴

Korean scholars and practitioners are firmly of the view that the courts remain entitled to grant preliminary measures such as attachments or injunctions even with the existence of valid agreement to arbitrate.

Under the KAA, the parties to an arbitration agreement must observe arbitral awards. When there is an action in breach of the agreement, the courts shall decline the jurisdiction on the matter which is to be referred to arbitration.²⁵ The court will, therefore, dismiss the action on grounds of the existence of an arbitration agreement. For preliminary measures, it is the courts which have the coercive power to be resorted to for making a prospective award effective. It is on this recognition that only the courts have the necessary powers to force the parties to comply with such orders.²⁶ For the present, it seems to be the common opinion among scholars that the parties may not

23. Westin and Chrocziel, 'Interim Relief Awards by United States and German Courts in Support of Foreign Proceedings,' (1990) 28 Colum.J.Int.L. 723, p.737.

24. Mund & Fester v. Hatrex International Transport [1994] ECR I-467 (Case C 398/92), p.479. para.16.

25. Art.3 of KAA

26. H. Kim, *op.cit.*, p.14, Mok, 'Comments on the Proposal for the Reform of Arbitration Act in terms of Court Practice,' (1995) 276 Arb.J.30, pp.35-36. (in Korean)

even empower an arbitral tribunal to grant a preliminary attachment or injunction. This will be changed once the current arbitration act is reformed on the basis of the provisions of the Model Law.²⁷

At the moment, it is not clear whether Korean courts can grant preliminary attachments or injunctions in aid of foreign arbitrations. Even current laws on arbitration do not answer this question.²⁸ It is recognised that lack of legislation on the arbitrator's power to grant interim measures of protection can cause serious confusion in various jurisdictions as has been shown in the United States. On the other hand, it is the provisions of Art.1074 of the Netherlands Arbitration Act which have obliterated such concerns.²⁹ Although it is not clearly prescribed in provisions on arbitration, the power of French courts to grant a conservatory measure is not questioned.³⁰ Under the proviso that the court assistance does not interfere with the arbitral proceedings, it can be said that Korean courts have power to grant preliminary attachments or injunctions in aid of foreign arbitration since the New York Convention is not considered to divest the court of the power to grant provisional measures.

C. Security for Costs

In a recent case before the House of Lords of the U.K., there were considerable

27. Art.9 of the Model Law

28. Art.9 of KAA empowers the arbitrator to request before the competent court to grant assistance which the arbitrator considers necessary for an award, but, outside of his competence to do so.

29. Art.1074(2) of the Netherlands Arbitration Act was intended to prevent any doubt between the existence of arbitration agreement which is under the New York Convention and the judicial assistance from the Contracting States to the Convention.

30. *Société Frangances v. Ray International and SA COFCI*. The French Court of Appeal held in the case that it had jurisdiction to grant, in view of the urgency and the alleged risk, interlocutory measures so as to prevent manifestly illicit disturbance in terms of foreign arbitration which was to be referred to the American Arbitration Association. Pluyette, 'A French Perspective', in *Conservatory and Provisional Measures in International Arbitration* edited by The ICC International Court of Arbitration (1993)

debates as to whether the English courts have the power to grant an order for security for costs in relation to an international arbitration whose seat was chosen to be in London for reasons of convenience. The decision in the case has drawn some criticism on the relationships between international commercial arbitration and the English courts. It has been pointed out that the decision caused much uncertainty about the role of the English courts since one of the judges in the case accepted the application of the order for security for costs on grounds of “exceptional” circumstances of the case. This “exceptional” test has caused rather deep concern about the future operation of international arbitration in London.³¹ It is desired that the decision should be rectified by clear language in the coming new Arbitration Act which is likely to repeal the Arbitration Act of 1975 which gives effect to the New York Convention in the U.K.

The issues about who pays the cost of arbitration, how the cost should be attributed, and whether legal costs should be included are areas most of which are not resolved by the provisions of KAA as well as KCCP. Currently, there are no provisions on costs of arbitration in KAA. When the costs of arbitration do matter, it is only possible to imply that the rules of KCAB will be taken into account. Under KAA, the rules of KCAB shall apply to “commercial arbitration” which is about disputes from legal relationships of commerce. In terms of the appointment of arbitrators³² or with regard to arbitral proceedings³³, the rules of KCAB shall apply when there is no agreement between the disputing parties, or when the agreement is not made clear.

In accordance with Art.10(1) of the rules of KCAB, the party wishing to raise claims shall pay the amount of the advance on costs of arbitration fixed by KCAB. The

31. Lynch, ‘Security for Costs in Domestic and International Arbitration in England and Hong Kong,’ (1995)12 J.Int.Arb.17; Sarre, ‘Security for Costs in ICC Arbitrations in England - The Ken-Ren Case,’ in ICC Court, *International Commercial Arbitration in Europe - Special Supplement*(1994) The ICC Bulletin 58

32. Art.4(3) of KAA

33. Art.7(3) of KAA

costs are comprised of administration fees, the remuneration of arbitrators and other expenses.³⁴ It is not certain whether legal costs can be assessed as one of the costs.

By reason of the inclusion of the rules of KCAB into KAA, the claimants in an *ad hoc* arbitration shall also deposit the costs of arbitration. Without any particular arrangements being laid down in arbitration rules, it is evident that the claimant will be asked to make a full deposit as the arbitration is under the rules of KCAB. In the event of the claim being awarded, the respondents will possibly have to bear the costs and under the award will have to pay them wholly or partially to the claimant.

Under KCCP, the plaintiffs, whose domiciles, offices or places of business are not in Korea, at the request of the defendant, shall be ordered to pay security for costs of the action before the court.³⁵ In accordance with Art.99-2 of KCCP, attorney's fees shall be included in the costs of action within the limit of the Rules of the Supreme Court. It is provided for in the Rules of the Supreme Court that a certain amount of attorney's fees can be disbursed from the losing party in an action before the court. It is, however, uncertain whether attorney's fees can be included in the security for costs in arbitration.

It may be questioned whether the arbitrator sitting in Korea may be empowered to order the claimant to pay security for costs of arbitration irrespective of whether the arbitration is administered by KCAB or not. Given that the eventual result of non-payment of the security is the dismissal of the claims in an action³⁶, arbitrators would not be empowered by the agreement between the parties. The question whether security for costs shall be ordered, therefore, will be decided by the *mandatory* power of the courts. Since the power to grant the order for security for costs is not within the competence of the arbitrator, the arbitrator, in his initiative, shall request the court to

34. Art.62(1) of KCAB Rules

35. Art.107(1) of KCCP

36. Art.108 of KCCP

order security for costs in accordance with Art.9 of KAA.

Although legal costs are not expressly included in the advance of the costs of arbitration under the rules of KCAB, they may be taken into account when the costs of arbitration are apportioned following the result of the arbitration. Since neither KAA nor the rules of KCAB deal with the way legal costs should be assessed, it may be questioned whether provisions of KCCP should be applied so as to fill the gap. In a court action, the successful party may get disbursement of attorney's fees which he paid for the action from the losing party. Similarly, the successful party in an arbitration seems likely to get disbursed from the opposing party within the statutory limit of the Rules of Supreme Court.

In a recent award in accordance with the rules of KCAB, however, it was decided that arbitrators were not bound to apply such Rules of Supreme Court as could be effective in assessing the amount of disbursement of the attorney's fees in a court action. The reasons are that the Rules of Supreme Court are not to apply to arbitrations, but to court actions or the cases where the provisions of KCCP are applied in the same manner as before the court.³⁷

V. Enforcement of Arbitral Awards in Korea

A. Requirements

Under Korean law, an arbitrator's award does not give the successful party the power to levy execution against the assets of the unsuccessful party or to have him committed for contempt. Although Art.12 of KAA provides that an award in an arbitration has the same effect as a final judgment of a court between the parties to the arbitration, it is recognised that the award still needs a judgment from a competent court so as to be enforced. It is evident from Art.14(1) of KAA that enforcement based on an

37. Recent Arbitral Awards, (1995) 275 Arb.J. 110 (in Korean)

arbitral award shall be possible only if the court decides the legality of such enforcement. In a way, the language of Art.12 of KAA is similar to that of Art.1476 of the French Code of Civil Procedure³⁸, Art.1059(1) of the Dutch Act of 1986³⁹, and Art.190(1) of the Swiss PIL of 1987⁴⁰.

For the enforcement of an award, the successful party needs to proceed to convert the award into a judgment of the court in Korea irrespective of the place where the award was made. In order to get an award in his favour to be enforced in Korea, the successful party shall raise an action in accordance with the provisions of KCCP. The action is the only way of getting the award to be enforced. It is safe to say that under Korean law, no arbitration award will be enforceable summarily. By analogy to normal proceedings of an ordinary action, an action to enforce an award will leave all steps open for the possibilities of abuse by the recalcitrant party. The plaintiff shall issue an originating summons, prepare for pleading, and undergo such judicial complexities as may be burdensome for the successful party, but a useful opportunity for the aggrieved party to defend the enforcement of the award.

B. Dual Application of Grounds of Setting Aside

Practitioners strongly contend that the current provisions on the enforcement of an award are likely to scare away foreigners wishing to refer their disputes to arbitration sitting in Seoul, Korea. What concerns them more is that the judgment requirement for the enforcement of an award would discourage the use of arbitration as a dispute settlement method among Koreans.⁴¹

38. "The award has, as of the moment it is rendered, *res judicata* effect with respect to the dispute which it decides."

39. "Only a final or partial arbitral award is capable of acquiring the force of *res judicata*...."

40. "The award is final from the moment of its communications."

41. Sohn and H. J. Kim, 'The Basics of the Reform of the Arbitration Act,' (1995) 276 Arb.J. 22, p.28. (in Korean); Sohn, 'The Problems of the Current Arbitration Act and Some Suggestions

The KAA provides for a double control of domestic awards in setting-aside or annulment, and enforcement proceedings. In the proceedings seeking a court judgment for enforcement, the court shall refuse the application of enforcement when there are grounds of setting-aside or annulment of an award.⁴² The grounds of setting aside of an award which are provided for in Art.13(1) of KAA,⁴³ therefore, are those for refusal of enforcement. Under Korean law, the court before which the enforcement of an award is sought shall decide whether the grounds of setting aside can be found. The two different proceedings of setting aside or enforcing an award are intermingled under Korean law.

C. Arbitral Awards under the Convention : Limited Defence

Upon the accession to the New York Convention, Korea declared both “reciprocity” and “commercial” reservations. The provisions of the Convention have the same effect as any other domestic legislation without any particular adoption into domestic law. For the enforcement of an award within the ambit of the Convention, the grounds of refusal in Art.V will be applied. Although there is a small number of cases with respect to the application of the grounds of refusal in Art V of the Convention, the Korean Supreme Court shows clearly the way the court approaches the enforcement of

on Efficiency- Enhancing Measures,’ (1995) 277 Arb.J. 5, p.7. (in Korean)

42. Art.14(2) of KAA

43. Art.13(1) of the KAA provides as follows :

“The parties may raise an action in order to set aside the arbitration award -

- i) if the appointment of an arbitrator or the arbitration procedure was not followed in accordance with the Act or arbitration agreement;
- ii) if the party was in incapacity or was not duly represented when the appointment of an arbitrator was made or while the arbitration was proceeding;
- iii) if the award involved a subject matter which can not be capable of settlement by arbitration under the law;
- iv) if the party was not heard in course of the proceedings without proper grounds, or if the reasons for the award were not stated; or
- v) if the grounds on which an action for judicial review according to section 422, paras. 4-9 of KCCP may be brought are found.

foreign arbitral awards under the Convention.

In the *GKN* case, the grounds of refusal of enforcement enunciated in Art.V of the Convention were thoroughly dealt with in respect of the enforcement of an award which had been made in London.⁴⁴

The Korean party in the second appealed case before the court submitted that there was no agreement to arbitrate, or that even if there was an arbitration agreement, it was effectively revoked by the Korean party. This submission was rejected on grounds that the agreement on the law applicable to the arbitration was found in the clear language of the arbitration clause which provided that "... all disputes under this contract or arising from it shall be resolved by arbitration according to the rules of London Court of International Arbitration as effective on the date of this agreement...." The court based itself on the latter part of the provisions of Art.V(1)(a) of the Convention.⁴⁵ The court held that it was clear from the arbitration clause that English law was applicable to decide whether an arbitration was revocable or not, and that under English law, a written agreement to arbitrate was irrevocable by one party without agreement to do so before reaching the end of arbitration.

The Korean party also submitted that the award should not be enforced according to Arts.V(1)(b) and V(1)(d) since the party was not able to present his case properly and to participate in composing the arbitral tribunal. The Supreme Court was not convinced by this submission. It was found out that the Korean party had been given notice about the proceedings through its branch in London, and that the arbitral tribunal had been constituted in accordance with the rules of LCIA which were stipulated in the arbitration clause. Undaunted by the findings, the Korean party argued

44. The *GKN* case (the second appealed case), the Supreme Court, 89 Da Ka 20252, Judgment of April 10, 1990.(in Korean)

45. Art.V(1)(a) provides in relevant part that "... the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

that the award was in breach of Korean public policy since the arbitral tribunal finished hearings in the absence of the party, assessed damages in excess of reasonable rates, and put interest on it based on American preferential interest rates without any statement of the reasons for doing so.

As for the default award, it was held that it was not in breach of public policy when it was the Korean party who was to blame since the Korean party had been given a proper notice of arbitral proceedings. As far as the extent of the amount of damages and the application of American interest rates are concerned, it was held that since it was the custom that damages for breach of contract in international trade were assessed on the basis of international interest rates which were recognised as reasonable, the enforcement of an award containing such damages should not be considered in breach of Korean public policy on grounds of the application of international interest rate, which was within the limit of Korean statutory interest rate, and for non-statement of the reasons for the application.

Although it took several years before the award was decided enforceable in Korea because of actions at different levels of the judiciary, it is worth mentioning that all the contentions by the Korean party which relied on the list of the grounds of refusal of the Convention were rejected. As far as the grounds of refusal of Art.V of the Convention are concerned, the attitude of the Korean Court in favour of the Convention can be traced as far back as early 1980s.

In *The Sun River* case⁴⁶, an award which was made in Japan under the auspices of The Japan Shipping Exchange Inc. was sought to be enforced in Korea. The plaintiff, the ship owner, was a Panamanian company. The defendant, the charterer, was a Korean company. The charter party between the parties contained an arbitration clause which stipulated that any dispute should be referred either to The Korean

46. *The Sun River*, Seoul District Court of Civil Affairs, 83 Ga Hap 7051, Judgment of April 12, 1984 (in Korean)

Commercial Arbitration Board or to The Japan Shipping Exchange. As a defence to the application of the enforcement of the award, the defendant submitted that there was no valid arbitration agreement since there were two optional arbitration institutions or places. It was also argued that the arbitral tribunal erred in applying Japanese law as a governing law even though Korean law should have been applicable as the law of the place of performance.

The court held that optional choices of the place of arbitration in an arbitration clause would not make the clause invalid if only one of the places was to be chosen.⁴⁷ Once the place of arbitration was chosen to be in Japan, the arbitration clause was in effect considered as having only one place of arbitration. It was held that Japanese law was applicable as the law of the place of arbitration which was justified under the Convention since the law of the place of arbitration in accordance with Art.V(1)(d) of the Convention should be applied in the absence of the agreement by the parties.

It was submitted that the defendant was not duly notified about the proceedings, and that the defendant's right of hearing was not observed. For those reasons, the defendant argued that the award should not be enforced on grounds of the violation of Arts.8(1) and 13(1)(iv) of KAA as the mandatory law of the enforcing country. The court found that the provisions of the Convention should be given priority of being applied in terms of the enforcement of an award under the Convention prior to the application of domestic rules and laws. It was held that the domestic law might be applied as complementary to the extent that the Convention does not cover. It was also held in the case that there was no breach of due process since the defendant himself withdrew from the proceedings.

As the last resort, the defendant pleaded that the arbitrator made an award without taking account of the defendant's submission on *force majeure* that the

47. A recent English decision shows quite similar reasoning. *The Star Texas*, [1993]2 Lloyd's Rep. 445.

demurrage disputes took place because of the outbreak of war between Iran and Iraq. Since the demurrage caused by the war should be regarded as one of the typical types of *force majeure* under Korean law in accordance with the relevant provisions of Korean Commercial Law, it was argued that the award without regard to *force majeure* defence should be in violation of the law of the enforcing country and should not be enforced for the breach of public policy.

It was held that the public policy grounds should be narrowly considered to the effect that the enforcement or recognition of an award would be refused on grounds of public policy defence only when such enforcement or recognition was considered to affect the political and economic fundamentals of the enforcing country or when the enforcement or recognition would not be reasonable on equitable terms. When the public policy defence was contested before the court, therefore, the acceptance of each ground based on public policy should remain exceptional, and should be possible only if there are special reasons for accepting the grounds. Such special reasons may be considered by international standards as well as domestic ones, specifically by the spirit of commercial arbitration for the community of international trade that disputes arising from international trade should be resolved by arbitration in a speedy and reasonable way.

In consideration of the reasons above, it was held that the enforcement or recognition of the award should not be refused. For the plea of *force majeure*, the court held that the submission that the *force majeure* defence was not accepted in the arbitration was not a ground of refusal of enforcement, but a reason for attacking the award because of the arbitrator's misapplication of substantive law. Even though it was established under Korean law that *force majeure* should be taken into account in deciding the matter on exemption of liability, it was held that the rejection by the arbitrator of the plea on exemption of liability for the reasons of *force majeure* would not be in breach of Korean public policy.

As far as the public policy defence among the grounds of refusal of Art.V of the Convention is concerned, the Korean courts show much the same way as can be seen in most other countries leading international arbitration. *The Sun River* case of 1984 showed clearly that the Korean courts would narrow down the application of the public policy defence, which has been confirmed in the *GKN* case.

D. Simplified Enforcement

1. Leading Countries

Under Korean law, since there are no particular provisions on the enforcement of awards outside the ambit of the Convention, such awards will be enforced in accordance with relevant provisions of KAA. As far as England is concerned, an award made in a country which is not a contracting party to the New York Convention would be likely to be enforced in accordance with section 26 of the Arbitration Act 1950. This provides that an arbitration award may by leave of the court to be enforced in the same manner as a judgment or order to the same effect, in which event judgment may be entered in terms of the award. It is most likely that although the award does not fall into either the category of 'foreign award' under Part II of the Arbitration Act 1950, or the category of 'Convention' award under the Arbitration Act 1975 which gives effect to the 1958 Convention in the United Kingdom, this would not preclude the recognition of the validity of the award at common law, nor the normal consequences of the enforceability of a valid award.⁴⁸

In a similar way as was shown in the United Kingdom, most of the leading countries in the arbitration community have some kind of simple way of enforcing an award, even though all arbitration laws require the recognition or enforcement of a foreign award before any execution actions can be taken. Dutch law requires the leave

48. Kerr, 'The Enforcement of a Taiwanese Arbitration Award,' (1990) Arb.Int. 167.

of enforcement to be requested from the President of the Court in whose district the arbitration has its seat and where the award is to be deposited.⁴⁹ Under Swiss law, domestic awards need not be recognised nor granted leave for enforcement. Instead, they are equated with final court judgments and are therefore directly enforceable both in the Canton where they were rendered and in other Swiss Cantons.⁵⁰

2. The Proposal

As influenced by the growing efforts to reform arbitration laws in neighbouring countries such as Hong Kong, Singapore, China and Japan, the only arbitration institution in Korea, KCAB, has launched efforts to reform the current KAA. Some scholars and practitioners have so far given their proposals and comments. As far as enforcement procedures are concerned, some are in favour of reforming the judgment requirement into simpler form in which ordinary trial is not necessary. What was suggested in the Proposal by the KCAB is that a court order is necessary so as to get an award to be enforced. Others are against such reforms on grounds that the simplified form of the enforcement of foreign award as can be seen in the Proposal leads to the undesirable result that a foreign award outside the ambit of the New York Convention could be enforced more easily than a foreign award under the Convention. The reason is that while a court order without formal trial is necessary for the enforcement of a foreign award outside the Convention, a foreign award under the Convention is enforced on the basis of reciprocity.

For the Netherlands and Germany, the reciprocity reservation is still in force. If in these countries an award is sought to be enforced from a non-Member country the party has to base its request on domestic enforcement law. Even if the Convention is applicable the party that seeks the enforcement of the award may base its motion on the

49. Art.1058(1) of the Dutch Act.

50. Art.190(1) of the Swiss PIL

domestic enforcement law under the “more favourable rights” clause of Art.VII(1) of the Convention. The Model Law does not contain a reciprocity requirement but the state adopting it may always declare such a reservation.

In the circumstances the party seeking enforcement of an award rendered in a Model Law state or in the Netherlands or Switzerland may always refer to liberal enforcement provisions in force in those jurisdictions. If the Model Law is incorporated into a new Korean Arbitration Act with the exclusion of provisions on the principle of reciprocity, it is probable that a person can get a foreign award outside the ambit of the Convention to be enforced in Korea in comparison to a foreign judgment from the point of the Korean courts. In accordance with Arts.476 and 478 of KCCP, a foreign judgment should satisfy the requirements of Art.203 of KCCP, one of which is a reciprocity guarantee. The opponents of the adoption of the Model Law would prefer to make similar provisions to those of Art.203 of KCCP in the Proposal so as to align the enforcement of an award outside the ambit of the Convention with that of a foreign judgment.⁵¹

In consideration of the growing number of the Contracting States to the Convention, it is not convincing to argue that Korea should stick to reciprocity principles in terms of a foreign award outside the ambit of the Convention. It is also not convincing that a foreign award which does not fall under the Convention should be treated less favourably than a foreign judgment to which the provisions of KCCP apply. The way of enforcing foreign awards outside the Convention can not simply be compared with that of enforcing a foreign judgment.

The argument of the opponents does not seem to stand firm as the countries leading international arbitration in attracting foreign parties enforce a foreign award summarily even with no reciprocal basis. The opponent argues that the action requirement of KAA to get an award to be enforced should be preserved in a new Act,

51. Mok, *op.cit.*, pp.40-41.

and that in terms of the enforcement of an award, if an award is enforced summarily without formal trial, then the foundation of KCCP would be undermined. In fact, one of the authors who used to be commissioned by the KCAB, made it clear in his comments on the Proposal that the enforcement proceedings under the new act would be paralleled with those by the provisions of the German Code of Civil Procedure(ZPO). Given that unified Germany is contemplating reforming the old-fashioned provisions on arbitration contained in ZPO⁵², it is interesting to see what provisions in ZPO should be taken into account for a new Korean Arbitration Act. Basically, KCCP has largely relied on German ZPO which was imported by the Japanese Code of Civil Procedure during the Japanese Occupation.

While the opponents argue that even an order requirement would undermine the principles of KCCP, the proponents, acclaiming the reform of the judgment requirement, are worrying about the weakness of the Proposal. Under the enforcement system in the Proposal which provided for a court order with obligatory hearings, there will not be a great difference between a judgment requirement of KAA to get an award to be enforced and an order through mandatory hearings. It is submitted that if the new Act is to be useful in attracting foreign parties to Korea, there should be simpler enforcement proceedings than those in the Proposal.

It is argued that mandatory hearings are not necessary to get an award to be enforced since they will cause such a serious delay that they can reduce the advantages of arbitration. Under the proposed enforcement system as well as the current system, the defendant will be given every opportunity to drag his feet at the enforcement stage of an award. Under the Proposal as well as the current KAA, every ground of setting aside can be raised since the grounds of refusal of enforcement are exactly the same as those of setting aside of an award. For these reasons, it is submitted that arbitration in

52. Berger, *International Economic Arbitration* (1993); Weigand, 'The UNCITRAL Model Law : New Draft Arbitration Acts in Germany and Sweden,' (1995) 11 Arb.Int. 397, p.400.

Korea will be considered somehow as a kind of preliminary action for the main defence in a subsequent action before the competent court.

It is evident that what has been consistently criticised in terms of the enforcement of an award is not a form of requirement of enforcement but a way of court practice. Although it is common practice that a judgment shall be obtained so as to get an award to be enforced in one country, the country may have a simplified form of enforcement of the award. It is easy to recognise that most countries leading international arbitration enforce an award summarily even if a judgment is required. Even under the current enforcement system of the KAA, if the courts had tried to simplify the enforcement proceedings in accordance with the provisions on summary proceedings provided for by Arts.432 to 445 of KCCP based on which the creditor can get an enforcement order without hearings, there may not be much concern about the way an award is to be enforced in Korea.

CHAPTER SIX: CONCLUSION

An arbitration agreement is well described as a particular and special kind of agreement showing the intention of the parties to refer their disputes to arbitrators rather than judges. Even when the agreement takes the form of a clause contained in an agreement, the clause embodies a separate, self-contained and collateral agreement. The arbitrator is authorised to conduct an arbitration and to make awards by the parties' agreement. It is established that the agreement to arbitrate is effective in compelling a recalcitrant party to arbitration unless the agreement is null and void, inoperative or incapable of being performed.¹

It is not surprising to see that legal rules, practices and institutional arrangements for resolution of international business disputes by arbitration are rapidly evolving side by side with the changing economic world.

Where the parties to an international contract are sophisticated and have engaged in arm's length business negotiation, the need to protect a weaker party with less bargaining power and limited means is reduced.

A party unwilling to participate in arbitration, either as a defence or in a suit for a declaratory judgment, may seek to have a contract involving an arbitration agreement declared void for violation of public policy such as the anti-trust laws, or securities law. In addition, a party may bring a separate action either for damages or for injunctive relief. When faced with such actions, the court is careful not to interfere with the arbitral process any more than is necessary to ensure judicial resolution of questions of public interest.

As regards an arbitral award, a specific waiver of appeal against the award may depend on the nationalities of the parties and the place of arbitration as well as the

1. Art.II(3) of the New York Convention of 1958

location of assets that may be needed to satisfy the award.² By submitting the dispute to arbitration by a given arbitration institution, the parties are deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.³

Nevertheless, an *ordre public* clause is contained in Art.V(2)(b) of the New York Convention of 1958. Under the Convention, the conditions which would constitute such a violation of public order are determined by the respective national law of the recognizing country.⁴ For instance, recognition of an arbitral award allowing punitive damages, available in the United States, may lead to a result which is obviously incompatible with the basic principles of the law of the country where the recognition is sought and thus is against the *ordre public*. Although the purpose of compensatory damages for pain and suffering in a Civil law country is similar to that of punitive damages in the United States, the other municipal law may not have permitted punitive damages to the extent of the *lex arbitri*, and the philosophical approaches to these laws may be completely different. Thus, a foreign arbitral award giving punitive damages cannot be recognized or enforced in the country where an award of punitive damages is contrary to the *ordre public* of the country.⁵ Since there is a public policy defence available under the Convention, the tribunal will firstly be required to apply the law and policy of its *situs* as they exist at the time, but simultaneously it must at least pay heed to the public policy of the forum where the award is likely to be enforced.⁶

2. Bond, 'How to Draft an ICC Arbitration Clause Revisited,' (1992) ICSID Rev.-FILJ 153, p.166.

3. Art.24(2) of the ICC Rules

4. Adler, 'If We Build It, Will They Come? - The Need For a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments,' (1994) 26 Law & Pol'y Int.Bus. 79

5. Farnsworth, 'Punitive Damages in Arbitration,' (1991) Arb.Int. 3, p.11.

6. Miller, 'Public Policy in International Commercial Arbitrations in Australia,' (1993) 9 Arb.Int. 167, p.188.

It is generally recognised that some useful measures prior to an award may be obtained from an arbitral tribunal. The tribunal, whose power is based on agreement by the parties, is allowed to exercise its power so as to preserve the *status quo* between the parties.

Although the rules of most international arbitral regimes authorize a tribunal to order interim or provisional measures, a tribunal has no executory authority to enforce the order against the assets of one of the parties. Moreover, it often takes several months to register a request for arbitration, appoint arbitrators and constitute the tribunal. Additional time may elapse before the tribunal meets to consider a request for provisional measures. During these months, the other parties can take steps to conceal or dissipate assets, for example, by transferring them to affiliated companies that are not parties to the arbitration agreement. When the time comes to enforce an arbitral award, there may be little or nothing left.

The availability of interim measures from the courts is the solution favoured by most legal writers and accords with the interpretation of the New York Convention in most contracting states. As international commercial arbitration is increasingly accepted as a method of resolving disputes, so is the role of national courts more important in making an arbitration efficient.

Attachment in the United States, the *Mareva* injunction in England and the *saisie conservatoire* in France and *Arrest* in Germany have a common purpose, which is to preserve the rights of the claimants. The remedy of attachment in its modern function had previously served as a common law jurisdictional weapon: the defendant's property was seized to compel his appearance, if he did not appear the property was lost. In modern practice the remedy is defined by statute and granted as security. While the remedy retains a limited jurisdictional function, orders of attachment primarily ensure that assets will be preserved against the day when a money judgment may be obtained and enforced. Once an order of attachment is delivered by

enforcement officer, plaintiff has a lien on defendant's personal property, including debts owed to him.

In virtually all countries, attachment, like other provisional remedies involving coercion, can be ordered by a court only. The availability and procedure depend on the law of the court before which the attachment is sought. The question of pre-award attachment - that is an attachment before or during the arbitration in order to secure the subject matter in dispute or payment in the case of a favourable award - is troublesome for the courts in the United States, although the trend seems now to be towards the recognition that such attachment is compatible with the Convention. Since the U.S. Supreme Court has not resolved differences in various courts, this results in providing irregularity and uncertainty with parties who have turned to arbitration because of predictability.⁷

No US court has doubted that an attachment in connection with the enforcement of an arbitral award in order to secure payment under the award is compatible with the Convention. Several courts in the United States have denied requests for pre-award attachments on the ground that such remedies were contrary to the parties' agreement to arbitrate, and thus to the New York Convention. Where the question is raised whether or not the Convention precludes attachment before or during arbitration proceedings, i.e., in the pre-award stage, the courts refer to Art.II(3) of the Convention. The cause of incongruent decisions by US courts in relation to pre-award attachments is rooted in the question how the particular word "refer" in Art.II(3) should be construed.

Thus, the main argument against the availability of pre-award attachment is that, because Art.II(3) provides that the court of a Contracting State shall "refer the parties to arbitration" rather than "stay the trial of action", the Convention forbids the courts of a Contracting State from entertaining a suit which violates an agreement to arbitrate.⁸

7. Note, 'What I Tell You Three Times Is True : U.S. Courts and Pre-Award Interim Measures Under the New York Convention,' (1995)35 Va.J.Int'l L. 971, p.997.

Although it is criticised, the *McCreary* decision seems inspired by the general “pro-enforcement-bias” of the U.S. courts towards the Convention. Just as it is not desirable to subject American property overseas to whatever rules of attachment and other judicial process apply in some foreign country when a US citizen has agreed to arbitrate a dispute, pre-award attachments may cause undesirable and unexpected results for foreign nationals in the United States. Thus, the court in the *McCreary* case saw that attachment as bypassing the consensual method of settling disputes and thus prohibited by the Convention since the Convention precludes the courts from acting in any capacity except to order arbitration, and that therefore an order of pre-award attachment could not be issued. Many courts followed the reasoning of the *McCreary* decision and held that Art.II(3) of the Convention precluded the courts from acting in any capacity except to order arbitration, and therefore an order of attachment could not be issued, and that to hold otherwise would defeat the purpose of the Convention.

In the meantime, the opposite solution prevailed before several courts where they granted attachment pending arbitration. The court in the *McCreary* case is criticised on the ground that it overlooked the distinction between procedural and substantial law since national courts must be deemed to retain their jurisdiction in respect of a procedural measure in aid of arbitration.⁹ The effect of Art.II(3) is merely that the courts have no jurisdiction to hear the merits of a dispute and retain their jurisdiction in respect of procedural measures in aid of arbitration. It is, therefore, submitted that the unfortunate decision of the *McCreary* case is based on the wrong presumption that Art.II(3) of the Convention completely divests the courts of the Contracting States of their jurisdiction. In the United States, for example, section 8 of Chapter 1 permits actions by libel and seizure of vessels in admiralty matters.

8. *Commentary on the 1958 Convention*, YCA XVI(1991) 476

9. van den Berg, ‘Recent Enforcement Problems under the New York and ICSID Conventions,’ (1989)1 Arb.Int.2, p.16.

In England, the protection afforded by a *Mareva* injunction is the reduction in the risk of the amount of the claim, or a part of it, being dissipated or otherwise put out of the plaintiff's reach before the resolution of the dispute. If such an injunction is granted and, if obeyed, (and assuming that there were in fact sufficient assets in the defendant's possession to cover the plaintiff's claim or part thereof), the plaintiff is protected until the rendition of awards against any steps the defendant may wish to take to render the judgment against him nugatory. This clearly protects the plaintiff during the period between the application and the resolution of the claim.

In 1980 and 1981, French arbitration law was thoroughly revised. The revised law, like the U.S. and U.K. arbitration statutes, distinguishes between domestic and international arbitration. Under French constitutional law, in contrast to that of the U.S. and the U.K., the Conventions are self-executing and do not require implementing legislation. Thus, for example, Article VI(4) of the European Convention on International Commercial Arbitration, which entered into force for France on February 16, 1967, continues to provide an express basis for provisional measures from the courts. Although there is no such express authority in the new arbitration law, the French courts have consistently held that the competence of an arbitral tribunal does not preclude a court from ordering provisional measures, including attachments (*saisies conservatoires*).¹⁰ The *saisie conservatoire* in France is very similar to Admiralty attachment and is used extensively because France has no writ *in rem*. France has only one procedure or "action" whereby suit may be taken, there being no writs *in rem* or writs *in personam*. Art.48 of the French Code of Civil Procedure (Old)¹¹ set out the

10. Brower and Tupman, 'Court-Ordered Provisional Measures Under the New York Convention,' AJIL(1986) 24, p.39.

11. Art.48(1), as translated, provides:
"In case of urgency and if the recovery of the doubt would seem to be in peril, the President of the Superior tribunal court or a Judge of the lower court in the domicile of the debtor or in the district where the goods to be seized can be found may authorize the creditor, supported by a claim which appears to be founded in its principle, to seize for conservation the moveable goods belonging to the debtor." (see, Tetley, 'Attachment, the *Mareva* injunction and *saisie*

general scheme for civil and maritime pre-judgment arrest (conservatory attachment). Although Art.48 of the Old Code of Civil Procedure was repealed by the Law of July 9, 1991, Art. 67 of the Law was enacted in almost identical form to Art.48.

French law does not require courts to have a concurrent jurisdiction over the subject matter underlying the attachment.¹² All that the law requires the claimant to establish is urgency, a debt which appears, in principle, to be owing, and some risk that the debt may not be paid if no order is made. In addition to attachments, the French courts have ordered a variety of other provisional measures even though the parties had agreed to arbitration of disputes. In the circumstances, civil litigation procedures are adapted and applied in order to support arbitral proceedings.¹³

The German equivalent of the *Mareva* injunction is the ordinary Attachment (*Arrest*).¹⁴ Unlike *Mareva* injunction, *Arrest* order has an in rem character. In Germany, although the creditor is not fully protected by an *Arrest* order, obtaining titular rights, he can seize the debtor's assets in advance of the subsequent judgment.¹⁵

In most legal systems, pre-trial civil proceedings cover a wide variety of procedural steps ranging from issue and service of process to all kinds of interlocutory matters. The primary purpose of the pre-trial process is to enable the parties to prepare their respective cases for eventual trial. It also gives them the opportunity to settle their disputes before the trial stage and provides them with interlocutory and provisional remedies aimed at preserving their rights and interests pending trial.¹⁶

conservatoire,' (1985) LMCLQ 58, p.65)

12. Sandrock, 'Prejudgment Attachments : Securing International Loans or other Claims for Money,' (1987) Int.Law.1, p.22.

13. Pluyette, 'A French Perspective,' in *Conservatory and Provisional Measures in International Arbitration* edited by The ICC International Court of Arbitration (1993), p.72.

14. Arts.916-934 of the German Code of Civil Procedure deal with Arrest.

15. Grunet, 'Interlocutory Remedies in England and Germany : A Comparative Perspective,' (1996) 15 CJQ 18, p.20.

16. Harris, 'Interim and Interlocutory Injunctions : Assessment of Probability of Success,' (1979)

Injunction as a provisional or interlocutory measure is quite versatile for the measures sought before or during arbitration. As a flexible remedy, injunctions have been authorised by statutes in an increasingly wide variety of areas, and the courts have become more willing to imply an injunctive remedy to effectuate the purposes of legislation that specifically provide only for administrative action, the recovery of damages in civil actions or the imposition of criminal sanctions.¹⁷

Interlocutory injunction is normally sought to preserve the *status quo* between the parties until their true legal relationship can be fully investigated at a trial.¹⁸ By maintaining the *status quo*, it is expected that the purpose of the action will be preserved. In the interlocutory stage, the decision of the court is to be based on affidavit, normally incomplete and uncontested as compared to the evidence at the trial, submitted by the plaintiff.

As for the speedy settlement of disputes, a party is allowed to request the court to declare, in cases it thought proper and necessary, whether the affidavits indicated the plaintiff had a *prima facie* case.¹⁹ It is, however, not easy for a court to estimate the chances of the plaintiff's ultimate success in the action and to decide the question whether the court would refuse or grant the application of interlocutory injunction.²⁰ Furthermore, if upon the available evidence based on conflicting and uncontested affidavits, an opinion as to the prospects of success of either party is to be expressed, it would only be embarrassing to the judge who will eventually have to try the case.²¹

NZLJ 515, p.525; Ngwasiri, 'Pre-trial Civil Proceedings in England and France : A Comparative Study,' (1991) CJQ 289

17. Note, 'Developments in the Law - Injunctions,' (1965) 78 Harv.L.Rev. 994, p.996.

18. *Fellowes & Son v. Fisher* [1976] QB 122, 141, *Hubbard v. Pitt* [1976] Ch 142, 190, *Philip Morris (New Zealand) Ltd v. Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 35, 38-39, per White J.

19. Gore, 'Interlocutory Injunctions - A Final Judgments?' (1975) 38 MLR 672, p.678.

20. *American Cyanamid v. Ethicon*, [1975] AC 396, p.406.

With all the uncertainty of the decision of *American Cyanamid Co. v. Ethicon Ltd.* on the question whether the court refuses or grants interlocutory injunction, the English court put less importance on the strength of the party's case based on the probability of success than on the question of balance of convenience.²² Balance of convenience takes no account of which party is likely to succeed at the trial. Thus, even where a high standard of probability of success was not made out, an interim injunction of a mandatory nature would be granted.²³

Mandatory injunctions are sought to prevent one of the parties from doing some action or to make the party do positive action. A positive mandatory injunction is generally considered to be more difficult to enforce than prohibitive mandatory injunction. The reason is that positive injunctions are likely to disturb the *status quo* rather than to maintain it. As a result, positive injunctions result in modifying the contract in question in material respects. It is, therefore, normal that the courts before which applications for positive injunctions are made are most likely to be reluctant to grant them.²⁴

The relationship between international commercial arbitration and national courts is complementary and essential to the success of an arbitration. It is, however, common ground that the powers of a national court are limited within its own jurisdiction. The *crucial* point for the limitation is that without international agreement, the courts cannot exercise the powers allowed by statutes efficiently abroad without

21. *Ibid.*, p.410; Recent Cases, (1977)51 ALJ 147.

22. Note (1975) 91 LQR 168, p.170.

23. The *Channel Tunnel* case, [1992]2 WLR 741, p.759.

24. Even if balance of convenience tilts in favour of the applicant, the courts in Scotland are reluctant to grant positive interim interdict. See, *Highland & Universal Properties Ltd v Safeway Properties* 1996 SLT 559. When the difficulty of getting positive injunction is taken into account fully and needs to be diverted, the claimant would seek prohibitive form of injunction rather than positive, to the effect that the adversary should be ordered to stop a certain action. See, the *Channel Tunnel* case.

causing conflicts with foreign competent courts. Besides this territorial limitation in general, the role of the court of the place of arbitration may be excluded specifically by the parties' agreement.

Whereas there are strong objections to the concept of complete party autonomy, the parties are free to agree to accept some risks which may arise from their agreement to exclude some of the power of the *curial* court. The parties may agree to exclude any judicial review so that the curial court would not set aside an award in substantial matters. In procedural terms, there are ways of excluding the assistance from the *curial* court. Unless there is any particular exclusion agreement, the question whether the power of the *curial* court is exercised depends in total on the court's discretion.

What is generally accepted as important or necessary is the extent to which the *curial* court deals with procedural matters arising out of arbitral proceedings. The reason is that while arbitration is of its nature based on the consent between the parties to refer their dispute to arbitration and such consent should not be disturbed but maintained until an arbitral award has been made, provisional measures obtained from a national court are sometimes necessary to make arbitration effective.

The discretionary power of a national court before which interim or provisional measures are sought is exercised differently from country to country. There are some courts which exercise their powers reluctantly in terms of the spirit of international commercial arbitration because they do not want to interfere with international arbitration. Therefore, such reluctance is based on a desire to assist the development of international commercial arbitration as a resolution method. This is the situation in which there are national laws applicable to an arbitration agreed by the parties to be sitting in a neutral country in consideration of their conveniences, subject to the rules of a particular institution, for instance ICC Rules. When the foreign parties to a contract governed by a foreign law and entirely performed abroad have chosen an ICC arbitration, it is assumed that the parties have given a signal of their intentions that they

are looking for a relationship with particular national courts which is less interventionary in relation to arbitral proceedings than would otherwise be the case. The demand or spirit of international arbitration supports the so-called “delocalisation theory” in accordance with which national courts are encouraged not to exercise their powers with regard to an international arbitration. At the extreme, it is argued that international arbitration is totally free from any control of the *lex loci arbitri*.

Other courts treat an international arbitration sitting in their jurisdictions just as they treat domestic arbitration. This comes from the fact that most national laws and institutional rules on arbitration are not detailed about the relationship between arbitral tribunals and the *curial* court, and that there is not much agreement on the concept of interim measures of protection in the world of international commercial arbitration. Since the scope of interim measures of protection can vary with the practice of arbitration and national courts, therefore, it is highly recommended that the parties should agree on special terms if they want some powers of the *curial* court excluded.

On the one hand, what is certain is that arbitrators are likely to take the lack of enforcing power into account when considering a particular kind of interim measure of protection. On the other hand, national courts backed by the sovereign power have diverse options for interim measures of protection even though the spirit of arbitration prevents the *curial* court from exercising their powers and international agreements must be in force so as to get the powers exercised abroad. These features give an arbitration some positive effects since all participants including the parties, the tribunals and the national courts, are in need of cooperation and restraint prior to a final award.

In a sense, the conflict between the extreme view of excluding all powers of the *curial* court and the necessity of active participation from the court is still under way and does not seem to be resolved easily in a short time. At the base of the issue about the extent to which national courts should exercise their powers are the psychology of the parties of different nationalities, the traditional approach of the *curial* court towards

international arbitration, and the demands of the world of international arbitration. Even though it is not easy to extract a common denominator of trends shown in leading countries, such trends reveal that the tribunal is getting more freedom in dealing with provisional measures requested before it and that national courts are more involved in making an arbitration effective.

Since the idea is prevalent in Korea that arbitration is a way of resolving disputes freed from legal restrictions, or sometimes that arbitration is not amenable to legal analysis, it may be submitted that to develop arbitration in Korea would not need any complicated code of rules and regulations. It is, however, not to be disputed that legal procedures are deeply involved in many aspects of arbitral proceedings, as can be seen in many developed countries. It is, therefore, safe to say that the existing KAA should be amended to set a clear guideline for those who are wishing to go to arbitration, in particular with respect to the relationship between arbitration and the courts in Korea. The KAA needs to be enlarged and streamlined in consideration of the development of law and practice of arbitration in the world. By reforming the KAA in line with the laws on arbitration in other countries, the relationships between arbitration and the courts in Korea are to be easy to understand, from which the users will benefit a lot.

It seems, however, certain that there are resilient objections to such reform leading to the effect that international arbitral awards outside the ambit of the New York Convention should be treated on the same level as those under the New York Convention. Most of the objections are mainly coming from the judiciary. The objections are often based on the assumption that foreign *arbitral awards* should be treated as foreign *judgments* which need enforcement judgment on reciprocity principles.

Many issues raised before the courts in Korea are moot. Since it is normal that court decisions in Korea hardly show legal matters in elaborate terms, it seems that

users of arbitration in Korea might be incapable of getting a clear view on arbitration from such decisions. In comparison with the law and practice of arbitration in leading countries, the relationship between arbitration and the courts in Korea is not close. While few cases are decided in respect of arbitral proceedings before an award is made, most of cases brought before the courts are related with enforcement procedures. It is, therefore, not easy to predict how the law and practice of arbitration in Korea are to be reformed so as to incorporate such concepts as are shown in the Model Law. It remains to be seen how much the reforming work of the existing arbitration laws could be carried out in legal ways.²⁵

25. At the time of editing the Chapter Six, the author has been informed that the Ministry of Justice had rejected the Proposal and decided to take over the work of the reform of the existing KAA. The Ministry of Justice based itself on the ground that the whole work of the reform of the current KAA needs reconsideration and vast consultation with persons representing broader interest groups.

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